S. Hrg. 100-250

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT, PUBLIC LAW 93-638

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

RECOMMENDATIONS FOR STRENGTHENING THE INDIAN SELF-DETERMINATION ACT

APRIL 22, 1987
WASHINGTON, DC

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INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT, PUBLIC LAW 93-638

WEDNESDAY, APRIL 22, 1987

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 2:10 p.m., in room 485, Russell Senate Office Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye, Evans, DeConcini, and McCain.

Staff present: Alan Parker, staff director; Patricia Zell, chief counsel; Joe Mentor, minority counsel; Michael Hughes, professional staff member; Sheila Rogan, professional staff member; Dan Lewis, professional staff member; June Tracy, professional staff member; Mary Jo Vrem, professional staff member; and Lynn Toledo, secretary.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, AND CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. The committee will come to order. Today we convene this committee to conduct this oversight hearing on recommendations for strengthening the Indian Self-Determination Act. This act, as some of you are aware, has been in existence for 12 years and has encouraged Indian tribes to participate in the planning and operation of programs to serve Indian communities. In most cases, the transfer of control and resources to the tribes has resulted in greater levels of achievement by Indian children in Indian-controlled schools, greater utilization of health facilities for Indian people, and stronger Indian families because of tribal emphasis on child welfare services, and in better law enforcement by Indian officers.

Increased stability in Indian communities as a result of programs operated by Indian tribes has, in turn, enabled Indian leaders to focus their efforts on economic development. While there has been greater progress, there have also been obstacles to Indian self-determination. The committee is strongly committed to working with Indian tribes to develop legislation that will remove those obstacles.

The committee is interested today in hearing positive and practical recommendations from tribal representatives that will result in increased effectiveness in the delivery of services and the management of tribal resources on Indian lands.

The committee is aware that amendments to the Indian Self-Determination Act will affect every Indian tribe and Alaska Native village. Amendments will also affect the Bureau of Indian Affairs, the Indian Health Service, and the Federal Government's relationship with Indian tribal governments. The committee intends to take a careful and deliberate approach to the development of a bill to amend the act. We recognize that there are many complicated issues which need to be addressed. Over the next several months, committee staff will work on a series of reports on the allocation of BIA and IHS funds for indirect costs, on the contractability of trust functions, and on the structure of Federal programs serving Indian tribes.

Today's hearing reflects our belief that Indian leaders who have worked with the law for the past 12 years are the real experts and are in the best position to suggest ways to improve the law. After working with the tribes, the committee intends to introduce a bill that will not only address the practical day-to-day concerns of Indian tribes in contracting, but will reflect the stronger commitment to the policy of Indian self-determination.

Today we begin the process of working toward such a bill, and we look forward to your testimony and your recommendations.

[The text of Public Law 93-638 follows:]

Public Law 93-638
93rd Congress, S. 1017
January 4, 1975

An Act

To provide maximum Indian participation in the Government and education of the Indian people; to provide for the full participation of Indian tribes in programs and services conducted by the Federal Government for Indians and to encourage the development of human resources of the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own educational activities; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Indian Self-Determination and Education Assistance Act".

Indian Self-Determination and Education Assistance Act.
25 USC 450 note.

CONGRESSIONAL FINDINGS

25 USC 450.

SEC. 2. (a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) The Congress further finds that—

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

DECLARATION OF POLICY

25 USC 450a.
88 STAT. 2203
88 STAT. 2204

SEC. 3. (a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

DEFINITIONS

'SC 450b. SEC. 4. For the purposes of this Act, the term—

(a) "Indian" means a person who is a member of an Indian tribe;

(b) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

(c) "Tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: *Provided*, That in any case where a contract is let or grant made to an organization to perform services benefitting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant;

(d) "Secretary", unless otherwise designated, means the Secretary of the Interior;

(f) "State education agency" means the State board of education or other agency or officer primarily responsible for supervision by the State of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

REPORTING AND AUDIT REQUIREMENTS

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ing.
'SC 450c.

SEC. 5. (a) Each recipient of Federal financial assistance from the Secretary of Interior or the Secretary of Health, Education, and Welfare, under this Act, shall keep such records as the appropriate Secretary shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the cost of the project or undertaking in connection with which such assistance is given or used, the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

TAT. 2204
TAT. 2205

(b) The Comptroller General and the appropriate Secretary, or any of their duly authorized representatives, shall, until the expiration of three years after completion of the project or undertaking referred to in the preceding subsection of this section, have access (for the purpose of audit and examination) to any books, documents, papers, and records of such recipients which in the opinion of the Comptroller General or the appropriate Secretary may be related or pertinent to the grants, contracts, subcontracts, subgrants, or other arrangements referred to in the preceding subsection.

(c) Each recipient of Federal financial assistance referred to in subsection (a) of this section shall make such reports and information available to the Indian people served or represented by such recipient as and in a manner determined to be adequate by the appropriate Secretary.

(d) Any funds paid to a financial assistance recipient referred to in subsection (a) of this section and not expended or used for the purposes for which paid shall be repaid to the Treasury of the United States.

PENALTIES

SEC. 6. Whoever, being an officer, director, agent, or employee of, or connected in any capacity with, any recipient of a contract, subcontract, grant, or subgrant pursuant to this Act or the Act of April 16, 1934 (48 Stat. 596), as amended, embezzles, willfully misapplies, steals, or obtains by fraud any of the money, funds, assets, or property which are the subject of such a grant, subgrant, contract, or subcontract, shall be fined not more than $10,000 or imprisoned for not more than two years, or both, but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

25 USC 450d.
25 USC 452.

WAGE AND LABOR STANDARDS

SEC. 7. (a) All laborers and mechanics employed by contractors of subcontractors in the construction, alteration, or repair, including painting or decorating of buildings or other facilities in connection with contracts or grants entered into pursuant to this Act, shall be paid wages at not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494), as amended. With respect to construction, alteration, or repair work to which the Act of March 3, 1921 is applicable under the terms of this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 2 of the Act of June 13, 1934 (48 Stat. 948, 40 U.S.C. 276c).

25 USC 450e.
40 USC 276a note.
5 USC app. II.

(b) Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934 (48 Stat. 596), as amended, or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible—

25 USC 452.

(1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and

(2) preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (88 Stat. 77).

25 USC 1452.

88 STAT. 2205

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88 STAT. 2206

CARRYOVER OF FUNDS

SEC. 8. The provisions of any other laws to the contrary notwithstanding, any funds appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208), for any fiscal year which are not obligated and expended prior to the beginning of the fiscal year succeeding the fiscal year for which such funds were appropriated shall remain available for obligation and expenditure during such succeeding fiscal year.

25 USC 13a.
25 USC 13, 52a.

TITLE I—INDIAN SELF-DETERMINATION ACT

itation of
itle.
5 USC 450f
ote.

SEC. 101. This title may be cited as the "Indian Self-Determination Act".

CONTRACTS BY THE SECRETARY OF THE INTERIOR

5 USC 450f.

5 USC 452.

5 USC 13,
2a.

SEC. 102. (a) The Secretary of the Interior is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organizaton of any such Indian tribe to plan, conduct, and administer programs, or portions thereof, provided for in the Act of April 16, 1934 (48 Stat. 596), as amended by this Act, any other program or portion thereof which the Secretary of the Interior is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto: *Provided, however,* That the Secretary may initially decline to enter into any contract requested by an Indian tribe if he finds that: (1) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory; (2) adequate protection of trust resources is not assured, or (3) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract: *Provided further,* That in arriving at his finding, the Secretary shall consider whether the tribe or tribal organization would be deficient in performance under the contract with respect to (A) equipment, (B) bookkeeping and accounting procedures, (C) substantive knowledge of the program to be contracted for, (D) community support for the contract, (E) adequately trained personnel, or (F) other necessary components of contract performance.

(b) Whenever the Secretary declines to enter into a contract or contracts pursuant to subsection (a) of this section, he shall (1) state his objections in writing to the tribe within sixty days, (2) provide to the extent practicable assistance to the tribe or tribal organization to overcome his stated objections, and (3) provide the tribe with a hearing, under such rules and regulations as he may promulgate, and the opportunity for appeal on the objections raised.

(c) The Secretary is authorized to require any tribe requesting that he enter into a contract pursuant to the provisions of this title to obtain adequate liability insurance: *Provided, however,* That each such policy of insurance shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the tribe's sovereign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy of insurance.

CONTRACTS BY THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

5 USC 450g.

8 STAT. 2206
8 STAT. 2207
2 USC 2001.

SEC. 103. (a) The Secretary of Health, Education, and Welfare is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to carry out any or all of his functions, authorities, and responsibilities under the Act of August 5, 1954 (68 Stat. 674), as amended: *Provided, however,* That the Secretary may initially decline to enter into any contract requested by an Indian tribe if he finds that: (1) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted for will not be satisfactory; (2) adequate protection of trust resources is not assured; or (3) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract: *Provided further*, That the Secretary of Health, Education, and Welfare, in arriving at his finding, shall consider whether the tribe or tribal organization would be deficient in performance under the contract with respect to (A) equipment, (B) bookkeeping and accounting procedures, (C) substantive knowledge of the program to be contracted for, (D) community support for the contract, (E) adequately trained personnel, or (F) other necessary components of contract performance.

(b) Whenever the Secretary of Health, Education, and Welfare declines to enter into a contract or contracts pursuant to subsection (a) of this section, he shall (1) state his objections in writing to the tribe within sixty days; (2) provide, to the extent practicable, assistance to the tribe or tribal organization to overcome his stated objections; and (3) provide the tribe with a hearing, under such rules and regulations as he shall promulgate, and the opportunity for appeal on the objections raised. Hearing.

(c) The Secretary of Health, Education, and Welfare is authorized to require any tribe requesting that he enter into a contract pursuant to the provisions of this title to obtain adequate liability insurance: *Provided, however*, That each such policy of insurance shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the tribe's sovereign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy of insurance. Liability insurance.

GRANTS TO INDIAN TRIBAL ORGANIZATIONS

SEC. 104. (a) The Secretary of the Interior is authorized, upon the request of any Indian tribe (from funds appropriated for the benefit of Indians pursuant to the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto) to contract with or make a grant or grants to any tribal organization for— 25 USC 450h. 25 USC 13, 52a.

(1) the strengthening or improvement of tribal government (including, but not limited to, the development, improvement, and administration of planning, financial management, or merit personnel systems; the improvement of tribally funded programs or activities; or the development, construction, improvement, maintenance, preservation, or operation of tribal facilities or resources);

(2) the planning, training, evaluation of other activities designed to improve the capacity of a tribal organization to enter into a contract or contracts pursuant to section 102 of this Act and the additional costs associated with the initial years of operation under such a contract or contracts;

(3) the acquisition of land in connection with items (1) and (2) above: *Provided*, That in the case of land within reservation boundaries or which adjoins on at least two sides lands held in trust by the United States for the tribe or for individual Indians, the Secretary of Interior may (upon request of the tribe) acquire such land in trust for the tribe; or 88 STAT. 2207

88 STAT. 2208

(4) the planning, designing, monitoring, and evaluating of Federal programs serving the tribe.

(b) The Secretary of Health, Education, and Welfare may, in accordance with regulations adopted pursuant to section 107 of this Act, make grants to any Indian tribe or tribal organization for—

(1) the development, construction, operation, provision, or maintenance of adequate health facilities or services including the training of personnel for such work, from funds appropriated to the Indian Health Service for Indian health services or Indian health facilities; or

(2) planning, training, evaluation or other activities designed to improve the capacity of a tribal organization to enter into a contract or contracts pursuant to section 103 of this Act.

(c) The provisions of any other Act notwithstanding, any funds made available to a tribal organization under grants pursuant to this section may be used as matching shares for any other Federal grant programs which contribute to the purposes for which grants under this section are made.

PERSONNEL

SEC. 105. (a) Section 3371(2) of chapter 33 of title 5, United States Code, is amended (1) by deleting the word "and" immediately after the semicolon in clause (A); (2) by deleting the period at the end of clause (B) and inserting in lieu thereof a semicolon and the word "and"; and (3) by adding at the end thereof the following new clause:

43 USC 1601 note.

Ante, p. 2204.

"(C) any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village as defined in the Alaska Native Claims Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and includes any tribal organization as defined in section 4(c) of the Indian Self-Determination and Education Assistance Act."

42 USC 2004a.

(b) The Act of August 5, 1954 (68 Stat. 674), as amended, is further amended by adding a new section 8 after section 7 of the Act, as follows:

42 USC 2004b.

42 USC 215.

Ante, p. 2206, 2207.

"SEC. 8. In accordance with subsection (d) of section 214 of the Public Health Service Act (58 Stat. 690), as amended, upon the request of any Indian tribe, band, group, or community, commissioned officers of the Service may be assigned by the Secretary for the purpose of assisting such Indian tribe, group, band, or community in carrying out the provisions of contracts with, or grants to, tribal organizations pursuant to section 102, 103, or 104 of the Indian Self-Determination and Education Assistance Act".

50 USC app. 456.

12 USC 2001.

(c) Paragraph (2) of subsection (a) of section 6 of the Military Selective Service Act of 1967 (81 Stat. 100), as amended, is amended by inserting after the words "Environmental Science Services Administration" the words "or who are assigned to assist Indian tribes, groups, bands, or communities pursuant to the Act of August 5, 1954 (68 Stat. 674), as amended".

12 USC 4762.

(d) Section 502 of the Intergovernmental Personnel Act of 1970 (84 Stat. 1909, 1925) is amended—

(1) by deleting the word "and" after paragraph (3);

(2) by deleting the period after paragraph (4) and inserting in lieu thereof a semicolon and the word "and"; and

(3) by adding at the end thereof the following new paragraph:

12 USC 4723, 1743.

13 USC 1601 note.

12 USC 4723, 1743.

"(5) Notwithstanding the population requirements of section 203(a) and 303(c) of this Act, a 'local government' and a 'general local government' also mean the recognized governing body of an Indian tribe, band, pueblo, or other organized group or community, including any Alaska Native village, as defined in the Alaska Native Claims Settlement Act (85 Stat. 688), which performs substantial governmental functions. The requirements of sections 203(c) and 303(d) of this Act, relating to reviews by the

18 STAT. 2208

18 STAT. 2209

Governor of a State, do not apply to grant applications from the governing body of an Indian tribe, although nothing in this Act is intended to discourage or prohibit voluntary communication and cooperation between Indian tribes and State and local governments."

Certain tribal organization employees, coverage, rights, and benefits.
25 USC 450i.

(e) Notwithstanding any other law, executive order, or administrative regulation, an employee serving under an appointment not limited to one year or less who leaves Federal employment to be employed by a tribal organization on or before December 31, 1985, in connection with governmental or other activities which are or have been performed by employees in or for Indian communities is entitled, if the employee and the tribal organization so elect, to the following:

Work injuries, compensation.
5 USC 8101.

(1) To retain coverage, rights, and benefits under subchapter I of chapter 81 ("Compensation for Work Injuries") of title 5, United States Code, and for this purpose his employment with the tribal organization shall be deemed employment by the United States. However, if an injured employee, or his dependents in case of his death, receives from the tribal organization any payment (including an allowance, gratuity, payment under an insurance policy for which the premium is wholly paid by the tribal organization, or other benefit of any kind) on account of the same injury or death, the amount of that payment shall be credited against any benefit payable under subchapter I of chapter 81 of title 5, United States Code, as follows:

(A) payments on account of injury or disability shall be credited against disability compensation payable to the injured employee; and

(B) payments on account of death shall be credited against death compensation payable to dependents of the deceased employee.

Retirement.
5 USC 8301.

(2) To retain coverage, rights, and benefits under chapter 83 ("Retirement") of title 5, United States Code, if necessary employee deductions and agency contributions in payment for coverage, rights, and benefits for the period of employment with the tribal organization are currently deposited in the Civil Service Retirement and Disability Fund (section 8348 of title 5, United States Code); and the period during which coverage, rights, and benefits are retained under this paragraph is deemed creditable service under section 8332 of title 5, United States Code. Days of unused sick leave to the credit of an employee under a formal leave system at the time the employee leaves Federal employment to be employed by a tribal organization remain to his credit for retirement purposes during covered service with the tribal organization.

Health insurance.
5 USC 8901.

(3) To retain coverage, rights, and benefits under chapter 89 ("Health Insurance") of title 5, United States Code, if necessary employee deductions and agency contributions in payment for the coverage, rights, and benefits for the period of employment with the tribal organization are currently deposited in the Employee's Health Benefit Fund (section 8909 of title 5, United States Code); and the period during which coverage, rights, and benefits are retained under this paragraph is deemed service as an employee under chapter 89 of title 5, United States Code.

Life insurance.
5 USC 8701.

(4) To retain coverage, rights, and benefits under chapter 87 ("Life Insurance") of title 5, United States Code, if necessary employee deductions and agency contributions in payment for the coverage, rights, and benefits for the period of employment with the tribal organizations are currently deposited in the Employee's Life Insurance Fund (section 8714 of title 5, United

88 STAT. 2209
88 STAT. 2210

States Code); and the period during which coverage, rights, and benefits are retained under this paragraph is deemed service as an employee under chapter 87 of title 5, United States Code.

USC 8701.

(f) During the period an employee is entitled to the coverage, rights, and benefits pursuant to the preceding subsection, the tribal organization employing such employee shall deposit currently in the appropriate funds the employee deductions and agency contributions required by paragraphs (2), (3), and (4) of such preceding subsection.

(g) An employee who is employed by a tribal organization under subsection (e) of this section and such tribal organization shall make the election to retain the coverages, rights, and benefits in paragraphs (1), (2), (3), and (4) of such subsection (e) before the date of his employment by a tribal organization. An employee who is employed by a tribal organization under subsection (e) of this section shall continue to be entitled to the benefits of such subsection if he is employed by another tribal organization to perform service in activities of the type described in such subsection.

mployee."

(h) For the purposes of subsections (e), (f), and (g) of this section, the term "employee" means an employee as defined in section 2105 of title 5, United States Code.

gulations.

(i) The President may prescribe regulations necessary to carry out the provisions of subsections (e), (f), (g), and (h) of this section and to protect and assure the compensation, retirement, insurance, leave, reemployment rights, and such other similar civil service employment rights as he finds appropriate.

(j) Anything in sections 205 and 207 of title 18, United States Code to the contrary notwithstanding, officers and employees of the United States assigned to an Indian tribe as authorized under section 3372 of title 5, United States Code, or section 2072 of the Revised Statutes (25 U.S.C. 48) and former officers and employees of the United States employed by Indian tribes may act as agents or attorneys for or appear on behalf of such tribes in connection wth any matter pending before any department, agency, court, or commission, including any matter in which the United States is a party or has a direct and substantial interest: *Provided*, That each such officer or employee or former officer or employee must advise in writing the head of the department, agency, court, or commission with which he is dealing or appearing on behalf of the tribe of any personal and substantial involvement he may have had as an officer or employee of the United States in connection with the matter involved.

ADMINISTRATIVE PROVISIONS

USC 450j.

SEC. 106. (a) Contracts with tribal organizations pursuant to sections 102 and 103 of this Act shall be in accordance with all Federal contracting laws and regulations except that, in the discretion of the appropriate Secretary, such contracts may be negotiated without advertising and need not conform with the provisions of the Act of August 24, 1935 (49 Stat. 793), as amended: *Provided*, That the appropriate Secretary may waive any provisions of such contracting laws or regulations which he determines are not appropriate for the purposes of the contract involved or inconsistent with the provisions of this Act.

USC 270a.

(b) Payments of any grants or under any contracts pursuant to section 102, 103, or 104 of this Act may be made in advance or by way of reimbursement and in such installments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this title. The transfer of funds shall be scheduled consistent with program requirements and applicable Treasury regulations, so as to

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minimize the time elapsing between the transfer of such funds from the United States Treasury and the disbursement thereof by the tribal organization, whether such disbursement occurs prior to or subsequent to such transfer of funds. Tribal organizations shall not be held accountable for interest earned on such funds, pending their disbursement by such organization.

Contracts, term.

(c) Any contract requested by a tribe pursuant to sections 102 and 103 of this Act shall be for a term not to exceed one year unless the appropriate Secretary determines that a longer term would be advisable: *Provided*, That such term may not exceed three years and shall be subject to the availability of appropriations: *Provided, further*, That the amounts of such contracts may be renegotiated annually to reflect factors, including but not limited to cost increases beyond the control of a tribal organization.

(d) Notwithstanding any provision of law to the contrary, the appropriate Secretary may, at the request or consent of a tribal organization, revise or amend any contract or grant made by him pursuant to section 102, 103, or 104 of this Act with such organization as necessary to carry out the purposes of this title: *Provided, however*, That whenever an Indian tribe requests retrocession of the appropriate Secretary for any contract entered into pursuant to this Act, such retrocession shall become effective upon a date specified by the appropriate Secretary not more than one hundred and twenty days from the date of the request by the tribe or at such later date as may be mutually agreed to by the appropriate Secretary and the tribe.

(e) In connection with any contract or grant made pursuant to section 102, 103, or 104 of this Act, the appropriate Secretary may permit a tribal organization to utilize, in carrying out such contract or grant, existing school buildings, hospitals, and other facilities and all equipment therein or appertaining thereto and other personal property owned by the Government within his jurisdiction under such terms and conditions as may be agreed upon for their use and maintenance.

(f) The contracts authorized under sections 102 and 103 of this Act and grants pursuant to section 104 of this Act may include provisions for the performance of personal services which would otherwise be performed by Federal employees including, but in no way limited to, functions such as determination of eligibility of applicants for assistance, benefits, or services, and the extent or amount of such assistance, benefits, or services to be provided and the provisions of such assistance, benefits, or services, all in accordance with the terms of the contract or grant and applicable rules and regulations of the appropriate Secretary: *Provided*, That the Secretary shall not make any contract which would impair his ability to discharge his trust responsibilities to any Indian tribe or individuals.

(g) Contracts and grants with tribal organizations pursuant to sections 102, 103, and 104 of this Act and the rules and regulations adopted by the Secretaries of the Interior and Health, Education, and Welfare pursuant to section 107 of this Act shall include provisions to assure the fair and uniform provision by such tribal organizations of the services and assistance they provide to Indians under such contracts and grants.

(h) The amount of funds provided under the terms of contracts entered into pursuant to sections 102 and 103 shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portions thereof for the period covered by the contract: *Provided*, That any savings in operation under such contracts shall be utilized to provide additonal services or benefits under the contract.

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PROMULGATION OF RULES AND REGULATIONS

25 USC 450k.

SEC. 107. (a) The Secretaries of the Interior and of Health, Education, and Welfare are each authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out the provisions of this title.

(b)(1) Within six months from the date of enactment of this Act, the Secretary of the Interior and the Secretary of Health, Education, and Welfare shall each to the extent practicable, consult with national and regional Indian organizations to consider and formulate appropriate rules and regulations to implement the provisions of this title.

(2) Within seven months from the date of enactment of this Act, the Secretary of the Interior and the Secretary of Health, Education, and Welfare shall each present the proposed rules and regulations to the Committees on Interior and Insular Affairs of the United States Senate and House of Representatives.

Publication in Federal Register.

(3) Within eight months from the date of enactment of this Act, the Secretary of the Interior and the Secretary of Health, Education, and Welfare shall publish proposed rules and regulations in the Federal Register for the purpose of receiving comments from interested parties.

(4) Within ten months from the date of enactment of this Act, the Secretary of the Interior and the Secretary of Health, Education, and Welfare shall promulgate rules and regulations to implement the provisions of this title.

(c) The Secretary of the Interior and the Secretary of Health, Education, and Welfare are authorized to revise and amend any rules or regulations promulgated pursuant to this section: *Provided*, That prior to any revision or amendment to such rules or regulations, the respective Secretary or Secretaries shall present the proposed revision or amendment to the Committees on Interior and Insular Affairs of the United States Senate and House of Representatives and shall, to the extent practicable, consult with appropriate national or regional Indian organizations and shall publish any proposed revisions in the Federal Register not less than sixty days prior to the effective date of such rules and regulations in order to provide adequate notice to, and receive comments from, other interested parties.

REPORTS

5 USC 450l.

SEC. 108. For each fiscal year during which an Indian tribal organization receives or expends funds pursuant to a contract or grant under this title, the Indian tribe which requested such contract or grant shall submit to the appropriate Secretary a report including, but not limited to, an accounting of the amounts and purposes for which Federal funds were expended, information on the conduct of the program or service involved, and such other information as the appropriate Secretary may request.

REASSUMPTION OF PROGRAMS

5 USC 450m.

SEC. 109. Each contract or grant agreement entered into pursuant to sections 102, 103, and 104 of this Act shall provide that in any case where the appropriate Secretary determines that the tribal organization's performance under such contract or grant agreement involves (1) the violation of the rights or endangerment of the health, safety, or welfare of any persons; or (2) gross negligence or mismanagement in the handling or use of funds provided to the tribal organization pursuant to such contract or grant agreement, such Secretary may,

3 STAT. 2212
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under regulations prescribed by him and after providing notice and hearing to such tribal organization, rescind such contract or grant agreement and assume or resume control or operation of the program, activity, or service involved if he determines that the tribal organization has not taken corrective action as prescribed by him: *Provided*, That the appropriate Secretary may, upon notice to a tribal organization, immediately rescind a contract or grant and resume control or operation of a program, activity, or service if he finds that there is an immediate threat to safety and, in such cases, he shall hold a hearing on such action within ten days thereof. Such Secretary may decline to enter into a new contract or grant agreement and retain control of such program, activity, or service until such time as he is satisfied that the violations of rights or endangerment of health, safety, or welfare which necessitated the rescission has been corrected. Nothing in this section shall be construed as contravening the Occupational Safety and Health Act of 1970 (84 Stat. 1590), as amended (29 U.S.C. 651). Notice and hearing.

EFFECT ON EXISTING RIGHTS

SEC. 110. Nothing in this Act shall be construed as— 25 USC

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

TITLE II—THE INDIAN EDUCATION ASSISTANCE ACT

SEC. 201. This title may be cited as the "Indian Education Assistance Act". Citation of title. 25 USC 455 note.

PART A—EDUCATION OF INDIANS IN PUBLIC SCHOOLS

SEC. 202. The Act of April 16, 1934 (48 Stat. 596), as amended, is further amended by adding at the end thereof the following new sections: 25 USC 452.

"SEC. 4. The Secretary of the Interior shall not enter into any contract for the education of Indians unless the prospective contractor has submitted to, and has had approved by the Secretary of the Interior, an education plan, which plan, in the determination of the Secretary, contains educational objectives which adequately address the educational needs of the Indian students who are to be beneficiaries of the contract and assures that the contract is capable of meeting such objectives: *Provided*, That where students other than Indian students participate in such programs, money expended under such contract shall be prorated to cover the participation of only the Indian students. 25 USC 455.

"SEC. 5. (a) Whenever a school district affected by a contract or contracts for the education of Indians pursuant to this Act has a local school board not composed of a majority of Indians, the parents of the Indian children enrolled in the school or schools affected by such contract or contracts shall elect a local committee from among their number. Such committee shall fully participate in the development of, and shall have the authority to approve or disapprove programs to be conducted under such contract or contracts, and shall carry out such other duties, and be so structured, as the Secretary of the Interior shall by regulation provide: *Provided, however*, That, whenever a local Indian committee or committees established pursuant to section 305 (b)(2)(B)(ii) of the Act of June 23, 1972 (86 Stat. 235) or an Indian advisory school board or boards established pursuant to this Act prior to the date of enactment of this section exists in such school district, 25 USC 456.

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such committee or board may, in the discretion of the affected tribal governing body or bodies, be utilized for the purposes of this section.

"(b) The Secretary of the Interior may, in his discretion, revoke any contract if the contractor fails to permit a local committee to perform its duties pursuant to subsection (a).

USC 457.

"SEC. 6. Any school district educating Indian students who are members of recognized Indian tribes, who do not normally reside in the State in which such school district is located, and who are residing in Federal boarding facilities for the purposes of attending public schools within such district may, in the discretion of the Secretary of the Interior, be reimbursed by him for the full per capita costs of educating such Indian students."

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SEC. 203. After conferring with persons competent in the field of Indian education, the Secretary, in consultation with the Secretary of Health, Education, and Welfare, shall prepare and submit to the Committees on Interior and Insular Affairs of the United States Senate and House of Representatives not later than October 1, 1975, a report which shall include:

USC 452.

(1) a comprehensive analysis of the Act of April 16, 1934 (48 Stat. 596), as amended, including—

(A) factors determining the allocation of funds for the special or supplemental educational programs of Indian students and current operating expenditures;

(B) the relationship of the Act of April 16, 1934 (48 Stat. 596), as amended, to—

USC 236.

(i) title I of the Act of September 30, 1950 (64 Stat. 1100), as amended; and

USC 821
e.

(ii) the Act of April 11, 1965 (79 Stat. 27), as amended; and

USC 241aa
e.

(iii) title IV of the Act of June 23, 1972 (86 Stat. 235); and

USC 631.

(iv) the Act of September 23, 1950 (72 Stat. 548), as amended.

(2) a specific program to meet the special educational needs of Indian children who attend public schools. Such program shall include, but need not be limited to, the following:

(A) a plan for the equitable distribution of funds to meet the special or supplemental educational needs of Indian children and, where necessary, to provide general operating expenditures to schools and school districts educating Indian children; and

(B) an estimate of the cost of such program;

(3) detailed legislative recommendations to implement the program prepared pursuant to clause (2); and

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(4) a specific program, together with detailed legislative recommendations, to assist the development and administration of Indian-controlled community colleges.

PART B—SCHOOL CONSTRUCTION

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SEC. 204. (a) The Secretary is authorized to enter into a contract or contracts with any State education agency or school district for the purpose of assisting such agency or district in the acquisition of sites for, or the construction, acquisition, or renovation of facilities (including all necessary equipment) in school districts on or adjacent to or in close proximity to any Indian reservation or other lands held in trust by the United States for Indians, if such facilities are necessary for the education of Indians residing on any such reservation or lands.

(b) The Secretary may expend not less than 75 per centum of such funds as are authorized and appropriated pursuant to this part B on those projects which meet the eligibility requirements under subsections (a) and (b) of section 14 of the Act of September 23, 1950 (72 Stat. 548), as amended. Such funds shall be allocated on the basis of existing funding priorities, if any, established by the United States Commissioner of Education under subsections (a) and (b) of section 14 of the Act of September 23, 1950, as amended. The United States Commissioner of Education is directed to submit to the Secretary, at the beginning of each fiscal year, commencing with the first full fiscal year after the date of enactment of this Act, a list of those projects eligible for funding under subsections (a) and (b) of section 14 of the Act of September 23, 1950, as amended.

20 USC 644.

(c) The Secretary may expend not more than 25 per centum of such funds as may be authorized and appropriated pursuant to this part B on any school eligible to receive funds under section 208 of this Act.

(d) Any contract entered into by the Secretary pursuant to this section shall contain provisions requiring the relevant State educational agency to—

(1) provide Indian students attending any such facilities constructed, acquired, or renovated, in whole or in part, from funds made available pursuant to this section with standards of education not less than those provided non-Indian students in the school district in which the facilities are situated; and

(2) meet, with respect to such facilities, the requirements of the State and local building codes, and other building standards set by the State educational agency or school district for other public school facilities under its jurisdiction or control or by the local government in the jurisdiction within which the facilities are situated.

(e) The Secretary shall consult with the entity designated pursuant to section 5 of the Act of April 16, 1934 (48 Stat. 596), as amended by this Act, and with the governing body of any Indian tribe or tribes the educational opportunity for the members of which will be significantly affected by any contract entered into pursuant to this section. Such consultation shall be advisory only, but shall occur prior to the entering into of any such contract. The foregoing provisions of this subsection shall not be applicable where the application for a contract pursuant to this section is submitted by an elected school board of which a majority of its members are Indians.

Program evaluation report to Congress.

(f) Within ninety days following the expiration of the three year period following the date of the enactment of this Act, the Secretary shall evaluate the effectiveness of the program pursuant to this section and transmit a report of such evaluation to the Congress. Such report shall include—

(1) an analysis of construction costs and the impact on such costs of the provisions of subsection (f) of this section and the Act of March 3, 1921 (46 Stat. 1491), as amended;

(2) a description of the working relationship between the Department of the Interior and the Department of Health, Education, and Welfare including any memorandum of understanding in connection with the acquisition of data pursuant to subsection (b) of this section;

(3) projections of the Secretary of future construction needs of the public schools serving Indian children residing on or adjacent to Indian reservations;

(4) a description of the working relationship of the Department of the Interior with local or State educational agencies in connection with the contracting for construction, acquisition, or renovation of school facilities pursuant to this section; and

C 644.

(5) the recommendations of the Secretary with respect to the transfer of the responsibility for administering subsections (a) and (b) of section 14 of the Act of September 23, 1950 (72 Stat. 548), as amended, from the Department of Health, Education, and Welfare to the Department of the Interior.

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(g) For the purpose of carrying out the provisions of this section, there is authorized to be appropriated the sum of $35,000,000 for the fiscal year ending June 30, 1974; $35,000,000 for each of the four succeeding fiscal years; and thereafter, such sums as may be necessary, all of such sums to remain available until expended.

PART C—GENERAL PROVISIONS

C 458a.

SEC. 205. No funds from any grant or contract pursuant to this title shall be made available to any school district unless the Secretary is satisfied that the quality and standard of education, including facilities and auxiliary services, for Indian students enrolled in the schools of such district are at least equal to that provided all other students from resources, other than resources provided in this title, available to the local school district.

C 458b.

SEC. 206. No funds from any contract or grant pursuant to this title shall be made available by any Federal agency directly to other than public agencies and Indian tribes, institutions, and organizations: *Provided*, That school districts, State education agencies, and Indian tribes, institutions, and organizations assisted by this title may use funds provided herein to contract for necessary services with any appropriate individual, organization, or corporation.

C 458c.

SEC. 207. (a)(1) Within six months from the date of enactment of this Act, the Secretary shall, to the extent practicable, consult with national and regional Indian organizations with experiences in Indian education to consider and formulate appropriate rules and regulations to implement the provisions of this title.

(2) Within seven months from the date of enactment of this Act, the Secretary shall present the proposed rules and regulations to the Committees on Interior and Insular Affairs of the United States Senate and House of Representatives.

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(3) Within eight months from the date of enactment of this Act, the Secretary shall publish proposed rules and regulations in the Federal Register for the purpose of receiving comments from interested parties.

(4) Within ten months from the date of enactment of this Act, the Secretary shall promulgate rules and regulations to implement the provisions of this title.

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(b) The Secretary is authorized to revise and amend any rules or regulations promulgated pursuant to subsection (a) of this section: *Provided*, That prior to any revision or amendment to such rules or regulations the Secretary shall, to the extent practicable, consult with appropriate national and regional Indian organizations, and shall publish any proposed revisions in the Federal Register not less than sixty days prior to the effective date of such rules and regulations in order to provide adequate notice to, and receive comments from, other interested parties.

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452.

SEC. 208. The Secretary is authorized and directed to provide funds, pursuant to this Act; the the Act of April 16, 1934 (48 Stat. 596), as amended; or any other authority granted to him to any tribe or tribal organization which controls and manages any previously private school. The Secretary shall transmit annually to the Committees on Interior and Insular Affairs of the United States Senate and House of Representatives a report on the educational assistance program conducted pursuant to this section. Report to congressional committees.

SEC. 209. The assistance provided in this Act for the education of Indians in the public schools of any State is in addition and supplemental to assistance provided under title IV of the Act of June 23, 1972 (86 Stat. 235). 25 USC 458e. 20 USC 1001 note.

Approved January 4, 1975.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 93-1600 (Comm. on Interior and Insular Affairs).
SENATE REPORTS: Nos. 93-682 and 93-762 (Comm. on Interior and Insular Affairs).
CONGRESSIONAL RECORD, Vol. 120 (1974):
- Feb. 8, considered and passed Senate.
- Feb. 18, action of Feb. 8 vacated.
- Apr. 1, reconsidered and passed Senate.
- Dec. 19, considered and passed House, amended; Senate concurred in House amendments.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 11, No. 2:
- Jan. 4, Presidential statement.

The CHAIRMAN. Our first witness this afternoon is Phillip Martin, chief of the Mississippi Band of Choctaw Indians of Philadelphia, MS. I am pleased to welcome the Honorable Phillip Martin. Together with him we will have Mr. Ed Red Owl, planning director of the Sisseton Wahpeton of Agency Village, South Dakota; and Mr. Will Mayo, assistant to the president, Tanana Chiefs Conference, Fairbanks, AK.

Gentlemen, welcome.

STATEMENT OF PHILLIP MARTIN, CHIEF, MISSISSIPPI BAND OF CHOCTAW INDIANS, PHILADELPHIA, MS

Mr. MARTIN. It's a pleasure for me to be here this afternoon and make a few comments on the proposed changes to the Indian Self-Determination Act. I am proud to be here with all of these distinguished people who will be testifying today who have knowledge of this act, and we will be discussing different aspects of this whole issue.

I think, in my judgment, there are two pieces of legislation in recent years that have been beneficial to Indian tribal governments and Indian people, the first being the Office of Economic Development programs, the OEO Program that was introduced and enacted in, I believe, 1964; and more recently, the Indian Self-Determination Act. These two acts have enabled the tribe to receive from the Government direct funds to the tribe which has enabled them to control, plan, and operate program as they thought was best for them. I think that is a good concept which the Congress adopted for Indian people.

Because of the intent of Congress to allow tribes to manage their own affairs, I have to say that the Choctaw people have come from almost nothing in terms of resources or money, to become one of the leaders in economic development in Indian country. But the economic development that we enjoy today, where we have six plants and over 1,200 people at work through this effort, comes from the development of a strong and stable tribal government, and indirect costs, funds that we receive for carrying out programs for the Federal Government. Indirect costs, is a vital and important item that we are concerned with today.

If it were not for indirect costs, we probably would not enjoy the success that we have enjoyed and are enjoying today because through indirect costs funds we have been able to set up a strong management system that has given us the capability to do what we are doing today. We have developed our community. We have brought self-pride to our people, and we have made a giant step toward self-determination, and I think that was the intent of Congress.

I have also attached to my testimony—and I am not going to read the testimony because it is a record in itself—I have attached to this a tribal executive branch chart describing the organizational structure that we have developed because of use of our indirect cost moneys. Indirect cost moneys are primarily set aside for administrative purposes. So this is right in line with what we have done.

As you can see, we have set up an office for the chief, office of the vice chief, research office, personnel, et cetera. You can see the different functions of the offices as well as the five departments. So we have brought all our programs together and established departments so that we can have centralized management and centralized control of our tribal government, and it has worked OK for us.

Also, indirect costs has been a big issue with BIA and IHS particularly because simply it's no secret that the last 4 or 5 years we had massive cutbacks in Federal programs and that every time a cut is made, then somebody gets hurt from it.

Right now, the Federal Government and the tribal governments are fighting for the same money that is appropriated for them. So there is a big conflict of interest on the part of the BIA in carrying out the Indian Self-Determination Act. We have had nothing but problems the last 6 years with the BIA and IHS in particular about indirect costs.

So I hope that through these hearings some real amendments can be made to make sure that the rights of the tribes to contract and the rights of the tribe to receive adequate administrative costs to conduct these programs be given to the tribes, and that that be done in the law so that there will be no mistake about it, rather than just putting these things vaguely into the law, because the BIA and the IHS are very good at twisting words around to their own advantage.

As an example of some of our problem, I have also attached a pie chart, I call it, for actual funding for fiscal year 1986. The pie shows the direct costs. We had $7,232,967 as direct. And on the right of that you have direct pass through moneys, $4,125,635, on which indirect cost was not paid to the tribe to carry out those programs. That reduced our indirect costs from 30 percent to 13 percent rate. So actually, the tribe lost over $1 million, almost $2 million of administrative moneys to carry out those particular programs.

At the same time, if the tribe was under the proposed fifteen percent flat rate proposed by BIA, then we would have had still more drastic cuts, where we would only receive 8 percent, just a little over $1 million to carry out over 12 million dollars' worth of programs for the Federal Government.

Now, we didn't invent these rates ourselves. It was given to us through the well-established operation by congnizant agencies. In this case it was HHS. Also, this is also established by OMB; these procedures are established by OMB. So we followed the procedures, the regulations and whatever, and got those established. But I think those kinds of regulations, which are not law, can be manipulated. So that BIA is in the process now of manipulating these regulations so that the tribes will be discouraged to contract under what money is available now. So I strongly would support that we change that concept and make it a law of entitlement for us to contract.

I also attach the actual figures for the contracts and grants for fiscal year 1986 for the tribe, which includes the various departments that we have various programs with, and it outlines the different costs and deficits there.

Before I leave, I would like to recommend a couple of things. One of the various reasons I support the concept of establishing a contract office within the BIA and IHS is to kind of separate it from the program management, separate it from area directors, so that the contract office would have the sole power and authority to contract with tribes. I don't think that there would be conflict of interest on their part. As a matter of fact, to maintain their jobs, they would have to do more contracting with the tribes. I believe a separate office for contracting would be a good idea to be tried out.

Also, the committee might consider strengthening the government-to-government relationship through direct funding. Many tribes have proven successful in administration and accountability to the point that serious thought should be given to directing Indian dollars straight to the tribes, avoiding the middle man in the BIA and IHS business offices.

Another thing which is not in this statement, but in thinking about other alternatives, one would be, since the OIG or the cognizant agencies establish the rate, why couldn't they determine what rate tribe is entitled to and also allocate money through them to the tribes rather than having to come through the BIA so that that would eliminate BIA involvement in payment of indirect cost rates in carrying out these contracts? I think we have to get them out of it so that we can eliminate that conflict-of-interest appearance, so that we can go forward in contracting and providing the services that our people are entitled to. So that's the reason why I would like to see the law changed to make contracting to tribes stronger and so that tribes can really have self-determination in management and control of their own affairs.

Thank you very much.

[Prepared statement of Mr. Martin appears in the appendix.]

STATEMENT OF EDWARD M. RED OWL, PLANNING DIRECTOR, SISSETON-WAHPETON SIOUX TRIBE, AGENCY VILLAGE, SD

Mr. Red Owl. Mr. Chairman, my name is Edward Red Owl. I am the planning director of the Sisseton-Wahpeton Sioux Tribe. We are located in northeast South Dakota. At this time I take this opportunity of thanking you, Mr. Chairman, personally, and members of the committee for inviting us to present testimony today.

I can recall in 1974 and 1975 our tribe submitted testimony with regard to the passage of Public Law 93-638. We were very strong advocates of the law at that time, and we consider it today a privilege to submit testimony for your consideration with regard to, first of all, reaffirming the law and, second, improving the law through amendment.

I have had the fortune of being the planning director of our tribe since 1971. At that time our council invited me home. I was in the mainstream in our society. I received a telephone call from our chairman asking me to come home for purposes of helping the infant tribal government do a comprehensive plan. In 1971 our tribal council owned an 850-acre land base. It was a meager tribe. It was a small tribe.

The tribal council at that time had an annual income of $1,100 per year. That was the sum total of its annual income. In that contex I was asked to come home, and they offered to pay me $50 a month, which was to be my salary. I was asked to work with seven communities, to work with 5,500 tribal members who wanted to know what could they do to improve their condition.

At that time, our council and its tribal members considered the Bureau of Indian Affairs and the Indian Health Service as separate entities having very little relationship to the people. It was at that time with a group of young leaders in our council that we talked about contracting.

We discovered that in 1913 there was an obscure provision that would provide for what we now know as the Buy Indian Act. Using the Buy Indian Act, whereby the superintendent of an agency would contract with individual Indians to cut wood for the agency's school, that under that authority we could contract some of the Bureau programs. And that is what we did.

We started doing that. At one of the first general council meetings that we held in 1971, we asked the entire BIA agency to make an annual report to the tribal membership, and that was done. And our issue was one of confidence. Our issue was one of motivation. We convinced our people that we could do the same type of work in a more effective manner. And that is what we did.

As our written testimony indicates—it is done very simply, it is not a legal document; it means to talk to you as the lawmaker from the heart—our task at hand was to convince them that they could do it. It was during that time that we conducted a reservationwide needs survey among our people, and we asked them the question, "What do you want to do? What do you want us to do?" And it was very clear what they had in mind for us to do. They said, "We want you to organize a land acquisition program so that our people can have land to build their homes on, so that we can have some public offices so that our people can live in the future."

With that mandate, we accordingly went not to the Bureau of Indian Affairs, we went to the Farmers Home Administration. It was there that we borrowed $250,000 for purposes of buying land.

Since that time in the early 1970's, we have borrowed over $5 million. Our tribes, which did not have a homeland, has now a homeland. We have purchased 26,000 acres of land. We did not ask for this land from the Government. We did not ask for any handout. We had to pay it back.

Our people, once that had been done, asked us to administer this land base. You see, our people owned 105,000 acres at that time, but the problem was one of heirship. It was severe heirship. And as we point out in the testimony, it was not unusual for 670 heirs to occupy 40 acres of land. That was our situation.

So therefore, our people asked us to administer our own land program. And again, we did not go to the Bureau of Indian Affairs. Instead, we went to school and learned how to acquire, manage, lease, and develop our own land base, so much so that today out of the 26,000 acres of land, 20,000 of it yields us in income in excess of one-half a million dollars a year. Our target this year is $750,000 just from agriculture alone. As many of you are aware, the Midwest is having an agricultural depression. But nevertheless, we obtained that type of income off of 20,000 acres of land. The Bureau of Indian Affairs on its part, out of a land base of 95,000 acres, can only generate $350,000.

Our mandate from our people is very clear. Our council and its administrative organizations clearly feel that they, moreso than the BIA, have the trust responsibility.

The second point is that we moved 2 years ago to contract under Public Law 93-638, the land operations program. It is considered a part of the Bureau's trust responsibility. That particular contract had over $155,000 allocated to it. It hired 1.5 civil servants, and they never left their office. It took us 18 months to negotiate that contract, and we finally obtained it, and we hired seven tribal members to operate that program. And our people are happy with the results of contracting that program.

Our story goes on in similar fashion. At the risk of being repetitive, we can only say that we encourage you, Mr. Chairman, and we encourage members of the committee to listen to the witnesses today because they have specific concerns dealing with the law. Our intent is not to negatively abuse the Bureau of Indian Affairs or the Indian Health Service, but to call upon you to view this legal instrument and to take the current administration's wording on government-to-government relationship and to incorporate that concept of the government-to-government relationship into the law. There are other types of vehicles to consider that some of our panelists today will be talking about.

My final remarks are with regard to our view of funds that this Congress provides to the Bureau of Indian Affairs. Studies as recent as 3 to 4 years ago indicated that only 85 cents—of the dollar that ever came to Indian country, that 15 cents went to Indian country and 85 cents stayed in Federal administration. It is our conviction that this Congress, and specifically this committee, can lay forth the framework to increase the amount of dollars that you provide, increase the dollars going to Indian country.

On our reservation it has become a thinking that the Bureau of Indian Affairs is no longer the Bureau of Indian Affairs, that the programs and the funds contained therein could not be justified without the presence of those people in Indian country, without the presence of the natural resource. And so the intention herein expressed by the committee in examining the law is a worthwhile one.

Our last comment that we would like to make is that the various specific and technical issues involved can be addressed, but we here today are but few, but we represent a new generation. Yours truly, I have been doing this and testifying before these committees since 1971. My youngest son is 12 years old. In 8 more years he will be graduating, and no doubt entering our local community college whose funding is provided by this Congress. On our reservation our youth comprise over 45 percent of our population. They are ready, Mr. Chairman, to become greater involved in the contract process. I thank you.

[Prepared statement of Mr. Red Owl appears in the appendix.]

The CHAIRMAN. Thank you very much.

Mr. Mayo.

STATEMENT OF WILL MAYO, ASSISTANT TO THE PRESIDENT, TANANA CHIEFS CONFERENCE, FAIRBANKS, AK

Mr. MAYO. I would like to open by saying to you my appreciation for the opportunity to testify. My name is Will Mayo. I am the assistant to the president of the Tanana Chiefs Conference. The Tanana Chiefs Conference is a multitribal contracting organization in the interior of Alaska. The tribal organizations that belong to our membership are 43 in number. The size of the area that we administer these programs in is around 235,000 square miles. That approaches nearly 40 percent of the State of Alaska.

In this region of Alaska, 75 percent of our tribes have no road systems that connect them with the State infrastructure. The only transport is aircraft for 8 months of the year. The unemployment rate in those remote communities ranges anywhere from a low of 20 percent in road-connected communities to over 80 percent in the more remote communities. My community where I am from is 130 miles from Fairbanks, the nearest urban center. The costs of transportation are very high.

The gap that is indicated by this lack of employment in meeting the basic human necessities of our people is met primarily by the subsistence hunting and fishing life style that is a central part of our culture and of our activities. The subsistence activities has often been called a hidden economy. The Tanana Chiefs Conference, through the various programs that we are able to contract, provides over 300 jobs in our region. About half of those jobs are village-based. The other half are urban-based because of the large health contract that forces us to centralize it in the center of the region. So we are providing a significant percentage of the employment opportunities in this large area.

We have divided our organization into six subregional offices located in villages in order to try to get the services to our people as opposed to having an urban-based central service delivery system. The costs of living in our areas—the cost of living for Alaska in general is around 30 percent over that of Washington, DC. However, in our remote communities, the cost of living increases significantly.

I would like to extend my appreciation to Congress for the current Federal policy of Indian self-determination. It has been valuable to our area. It has provided services that previously were very inconvenient or not available at all. The services that we are able to offer are staffed primarily in the villages by our own tribal members. The services are brought to the remote residents directly to their communities, which means a fantastic savings in time and money, and makes these services available where previously they were not. The opportunity to provide the services that we do through Public Law 93-638 provides skill and leadership development where it is really needed, these remote communities where resources are so few.

Getting to the point of the oversight hearings, specifically amendments to the Public Law 93-638, I have several recommendations. I know that some of these will be touched on a number of times by the witnesses, so I will go over the ones that most concern us, as briefly as possible.

There have been difficulties in the contract approval process. The name of the game between the tribes and the BIA or the IHS seems to be competition. The system that we have to operate in creates this situation where you have the competition for funds and the resources.

In the area of approval of contracts, this is very true. The approval process is sometimes delayed excessively and is very cumbersome due to multilayers in the approval process.

So as a recommendation, we would like to see a decrease in that. Some suggestions have been to allow approvals of contracts at the agency level. Other suggestions are to create a special office for the purpose of contract approvals that would bypass the area and agency level and be sufficiently aside or removed from those offices so that it would decrease the chances for competition.

Moving on in the recommendations, the allocation of funds—this has been mentioned—the allocation of the funds at the area level and at the agency level is also summed up by the word "competition." Sometimes we don't know what is going on. Oftentimes in the area level it's a mystery. So we would like to see amendments to Public Law 93-638 that would place the tribes directly into this loop, this process. We would like to see tribal adoptions of area plans and to see them integrated into the agency level of planning for expenditures and allocations.

On another point, the regulations are very cumbersome. They appear in a number of different publications along with manuals of department or bureau procedures. We would like to see this regulation simplified, placed possibly in one publication where they would be easily accessible and cross-referenced. Also, oftentimes the manual of procedures becomes a problem because they are applying those procedures to tribal operations. We would like to see that stopped.

On another issue, already it has been touched on, the indirect appropriation process. We would like to see in the amendments a process adopted that would require the BIA and the IHS to gather accurate detailed indirect cost needs based on the negotiated rates as applied to available program direct dollars. Sometimes it seems that what we have seen is that this is not being done and the indirect funds are experiencing shortfalls due to the inaccurate information that is being supplied.

Last, and this is a problem that we have experienced in the area of court actions, recently we had a case involving our contract that as a result we filed an action in the district court. Although we were held to be correct in our assertions in that action, the district court stated that they could not supply a remedy because the district court was limited to claims under $10,000. They then directed us that we should file an action with the court of claims.

Our problem here, and our recommendation is, that a new paragraph be added to the Public Law 93-638 that would allow cojurisdiction and first review in district courts or that would allow the district courts to handle these cases that include larger amounts than $10,000. In this particular case, the claim was for $150,000 that was being withheld from contracting. In fact, those dollars were allocated and in our contract and then were removed as a result of some IHS actions.

So, Mr. Chairman, that concludes my recommendations. I have submitted them in writing, and I appreciate the opportunity once more to testify before you.

[Prepared statement of Mr. Mayo appears in the appendix.]

The **Chairman**. Chief Martin, you spoke of passthrough costs that should be included in indirect cost calculations. Have you made any study as to the cost of administration of these passthrough projects?

Mr. **Martin**. Some of those passthroughs don't cost very much to handle, but some of the programs like social services, we have over $1 million of social service funds that we have to administer just like any other program. We have a lot of checks that we have to write. We have to keep books on them. We have to do everything we do with other programs that we receive indirect costs. Such things as training money, JTPA, they have by law a limited amount that they can pay for indirect costs or administration of their funds. We also handle a lot of construction money and we also have to be accountable for that.

So in my judgment, the Federal Government is getting free, gratis on those particular projects. Now, not every program is like that, but generally most of them require a lot of administration and accountability. We have to account for those just like any other program that we have, and it takes a lot of time to do that as well.

I don't have a study that I can quote you now, but I can gather up some stuff that I am familiar with.

The **Chairman**. I think it would be very helpful for the committee in order to justify whatever changes we may recommend.

Mr. **Martin**. Yes, sir.

The **Chairman**. And especially since this may come within the area of administrative decision instead of statutory change, statistics in support may shore up our case when we discuss it with the Department of Interior.

Mr. **Martin**. Yes; Mr. Swimmer already told us that his 15 percent flat rate would also exclude the so-called passthroughs.

The **Chairman**. Now, I believe your testimony said that for fiscal year 1986 you received a total of $11.3 million, but if you had received all of your passthrough costs, you would have received $3 million to clear your indirect costs instead of $1.5 million. Is that correct?

Mr. **Martin**. Yes, sir.

The **Chairman**. So you are suggesting that you have been "cheated out of $1.5 million?"

Mr. **Martin**. $1.9 million. We were shorted $1.9 million.

The **Chairman**. And you are suggesting that you have provided the service, and you were not paid for it?

Mr. **Martin**. Yes, sir.

The **Chairman**. Director Red Owl, just one clarification. In your statement, I believe you said, "Of the dollars that we provide to the Bureau, 85 cents stays with the Bureau and 15 cents goes to the tribes"?

Mr. **Red Owl**. That's correct. This came from Mr. Ross Swimmer's reservation economy study that was commissioned prior to his becoming Assistant Director of the Bureau of Indian Affairs.

It is our firm conviction that that continues to be the case, as many of the presenters today will indicate, that the bulk of appropriated dollars for Indian affairs stays within the Federal administration. It is justified in some form or another. And after you count the dollars that actually go to the reservation, it is our opinion that it amounts to 15 cents. And especially when you consider the amount of work—and perhaps that does not count the amount of work that tribal governmental organizations must perform under the burden of current regulatory requirements by the agency—the cost would be much higher.

The CHAIRMAN. Do you also agree with Mr. Mayo that the bureaucratic maze in contracting can be clarified and simplified?

Mr. RED OWL. Yes; we believe that there are a number of ways to simplify the process of contracting. The feeling, as our panelists have pointed out so far and as will be pointed out, is that the administration is strongly advocating a government-to-government relationship, but in fact it is a competitive one and often the relationship can be specified as that between a superior and an inferior. That is not a healthy relationship.

The CHAIRMAN. I will instruct the staff to draft appropriate legislative language to change this, because contracting is procurement, isn't it, but you are treated like all Government procurement?

Mr. MARTIN. That is what we would like to be treated, equally to other contractors that do business with the Government.

The CHAIRMAN. But because of your status as sovereign governments, you would prefer special treatment, wouldn't you?

Mr. MARTIN. I do not understand what you mean.

The CHAIRMAN. I believe that under the present law you are required to adhere to the bureaucratic requirements, since the Government is buying your services, in essence, when the special relationship should not call for this complicated procedure. Now, we are going to try to change this, and we hope that your experts can sit with our staff to come up with appropriate language that will work.

What we don't want to do is to make it more complicated, and that is one of the dangers of legislation. We may have the best intentions, but it may just complicate matters.

Mr. MARTIN. Yes; we're opposed to complicating it any further. I think it needs to be clarified. A lot of things in place now need to be clarified and direct the BIA and IHS to do certain things like ask Congress for money to pay the indirect costs, be required to pay the indirect costs, which they are not really required to pay now.

The CHAIRMAN. Mr. Mayo, you spoke of 18 months of delay in negotiating a contract?

Mr. MAYO. I didn't mention that period of time specifically, no.

The CHAIRMAN. How long does it take on an average?

Mr. MAYO. Well, it can vary. Recently, we have been contracting, you know, for a number of years, and we have a pretty good rapport with the agency level. But we have seen 6 months, in excess of 6 months, for other contractors in our area to try to get approval, and my understanding in other regions and for other tribes in the Nation is that the approval process has been delayed even longer than that.

The **Chairman**. Do you have any reason as to why you think it has been delayed? Do they give you any reason for the delay?

Mr. **Mayo**. Well, the reasons, there aren't any that are really given, but there are some, and there may be—oh, there may be processes in the approval that they kick back that need more information, maybe something in the application wasn't done properly, and sometimes you don't know why. It just sits on someone's desk and there are no explanations provided, and you try to chase them down and discover what's holding it up.

The **Chairman**. Is there any office or division in the Bureau that serves to assist you in applying for these contracts?

Mr. **Mayo**. The technical assistance is provided for new contractors, and there is resources available for asssisting in that. But as the contract approval process moves on through the layers—and in our case it might start at the agency level and then go all the way down to Juneau for further processing and it just begins to bog down and bottleneck in the process.

Mr. **Martin**. May I add on that?

The **Chairman**. Yes, sir.

Mr. **Martin**. In my judgment, one of the reasons why we have so many problems with contracts with both agencies, BIA and IHS, is because they really don't have a contracting management system in place. It's not a priority with them to be contracting with the tribes. So when we make our proposals, they take their good old time. There is no requirement, hardly, when they have to respond. There is no penalty in case they don't carry out their agreement; there is no penalty on them.

So this is the reason why some of us advocate a separate contracting office within those two departments. Then it would be their business to deal directly with us. It would be their business to be accountable for their action as well as speeding up and getting the contracting processes under way.

Really there is no priority for contracting with tribes.

The **Chairman**. Well, I suppose if we expedited everything, there would not be any justification for the bureaucracy. [Laughter.]

Mr. **Martin**. That would be good for a change.

The **Chairman**. I can assure you that we will do our best to bring about a change in this. A 6-month delay is not justified.

Mr. **Mayo**. Thank you very much.

Mr. **Red Owl**. Just one brief comment, Mr. Chairman. Our tribe was the subject of the 18-month delay, and the reason for it was that the area office wanted to place one of their reduction-in-force employees in our contract program. Therefore, they were asking us to revise our contract to fit his personnel qualifications. They were also asking us to set a salary level at what they thought to be appropriate. And the council did not want to do that; they wanted to advertise, and they felt that among the tribal membership there were people who could perform that task.

The compromise solution was that we agreed for the Bureau to take a part of the funds and hire a consulting company—in this case, the Soil and Conservation Service, which is a State agency—to provide technical assistance. And during this process, an 18-month period of time had passed before the contract was finally awarded.

The **Chairman**. In other words, if you had acceded to their demands, it would have been expedited?

Mr. **Red Owl**. That's correct.

The **Chairman**. Extortion, is that what you're suggesting? [Laughter.]

Well, I thank you very much. I can asure you that something will be done.

On our next panel on the allocation of Federal funds for tribal contracts and indirect costs, we have with us the chairman of the Jamestown Klallam Tribe of Sequim, WA, the Honorable Ron Allen; the deputy director of the Columbia River Inter-Tribal Fish Commission of Portland, OR, Mr. Lloyd Coon; certified public accountant from Madras, OR, Mr. Jim Sizemore; and the finance officer of the Rosebud Sioux Tribe, Rosebud, SD, Mr. George Shelhamer.

Gentlemen, welcome.

I presume our first witness is Chairman Allen.

STATEMENT OF RON ALLEN, CHAIRMAN, JAMESTOWN KLALLAM TRIBE, SEQUIM, WA

Mr. **Allen**. Thank you, Mr. Chairman. I also am honored and thankful that I am invited here to testify before you and the committee on this very important topic. I represent a small tribe in Washington State that consists basically of 250 members. I am also representing the Northwest Indian Fish Commission, which is a consortium of 20 tribes in the Northwest that manages a fishery program. I am also on the executive board for the Affiliated Tribes of Northwest Indians.

For Affiliated Tribes, we appointed a task force to address this indirect-cost issue and specifically to stop this 15 percent flat administrative fee that is proposed by Ross Swimmer and the administration of the Bureau.

We as a task force have put together a document that identifies how the indirect cost rate has been addressed in the Northwest, with 36 tribes as examples, and basically broke it down into the justification of why the existing system and process is appropriate is the proper procedure to account for the costs of contracting the Federal program and services that are available to the tribes, and to refute the argument by the BIA that their rate is 8 percent, to show that there are some very serious discrepancies within their position.

Our study is designed basically to educate three basic entities: the tribal people themselves, who often have confusion about the issue, the Bureau of Indian Affairs, who we feel does not fully understand the issue—and IHS, and Congress, the Congressmen and Senators and their legislative aides, who do not fully understand the issue, in our judgment, either.

What we wanted to do was try to take a complex issue, explain it in as simplistic a way as we can, and show that it is justified, that they are justified costs and that they are not costs that are being incurred by the tribes that are unfair or unjust. We felt we needed to show Congress that we are not ripping off the Federal Government; we want to make it very clear through this document that this is not the case at all. So we are attempting to demyth this theory that is being shared by many, and show that the existing system is a proper and legal procedure to use.

I am coming from a perspective of entities who do not have land bases or have very small land bases. My tribe, for example, has a 2-acre reservation. The organization that I am a member of has no resources. So when you end up into the indirect-cost issue and all the problems that surround it, you basically end up in a situation where they are not capable of addressing the deficit spending that sometimes will be incurred or often will be incurred in managing these contracts through the existing system.

We too believe that the law is good. We believe the law is a good foundation. We believe the spirit and intent of the law is correct, in that it would be the mechanism that would allow us to pursue our self-sufficiency and self-determination goals as they apply in each of our unique conditions.

Those of us who are in small tribes believe that we can develop economic bases. We believe that the law can provide us that means to accomplish that goal. But one of the things that we are trying to accomplish here is to strengthen the law and refine the law such that it becomes an effective tool that will allow us to pursue our goals without unreasonable legal/administrative obsticals.

What we are trying to do in our study is examine ways to address the indirect-cost issue, as well as address other Public Law 83–638 contracting and BIA budgeting issues that occur between the tribes and the Federal Government.

My partners here will be addressing some of the items more specifically, but what I want to do is more address the idea of how the financing takes place or how the managing of the financing takes place between the tribes. Since I am an administrator as well as the tribal chairman—we were recognized in 1981, so we are a relatively new tribe—I had to learn how the system worked. In other words, I had to learn how we established the funding for the tribe and for its programs in a system, how it works from the agency to the area office level to back here in Washington, DC.

In doing so, we learned about the system called the Indian Priority System [IPS]. Lloyd Coon will be addressing it more specifically. But in a nutshell, it is a system in which a tribe 2 years prior to the fiscal year attempts to plan or direct how the funds that are supposedly in their base will be spent, what programs they will be appropriated in. While I participated in that process, because I had to focus in on how to recommend to my tribal council how to manage their funds, we discovered a considerable amount of problems and frustrations with that particular system.

We discovered that it wasn't really adhered to, and that created a great deal of frustration. So we couldn't count on the funds being in the areas that we wanted them to be in, or we couldn't foresee any arbitrary action by high-level BIA officials. Unfortunately, because of that unknown, it made it difficult for us to even know whether or not our base was going to still be there and even to negotiate with the Inspector General's Office [OIG] as to what our indirect rate is because the base is always ambiguous. It was always basically unknown.

Now, for small tribes, most of us fall into a category where the base itself that we have was always insufficient for the indirect rate that we were given. Because over the years, the last few years, since the trend or the political mood has been to drive the rates down, getting caught up in the rates themselves as opposed to what the rates mean in real dollars, the OIG and the Bureau had a philosophy to try to keep those rates down. Subsequently, the tribes weren't able to recover the real rates. So those of us who were small tribes has to subsidize those real operating costs of carrying out those contracts.

We did that through some BIA, IHS, or EDA grants. They were called self determination grants, Core Management Grants, and in IHS there was some administrative assistance type grants. Basically, those grants made up the support cost funding shortfall. So if we had a negotiated rate of 30 percent, for example, then if you add the grant on top of it which addressed real costs that were also incurred in carrying out those contracts, your real rate was probably more like 50 percent, just as an example.

The problem is that those grants were at the whim of the BIA officials or some congressional people who may think of them as short-term panaceas with which the problem will be resolved within 5 years or 2 years or whatever it may be. Unfortunately, that was not the problem. The problem was the adequacy of the funding to cover those real funding needs.

One of the points that we are trying to make very clear is that those funds over the years, for the last 10 years, have dropped from around $20 million down to the next fiscal year they are projected $6 million. The number of tribes eligible to receive those programs have increased by three-fold, which means that the amount of money available there is absolutely inadequate, and subsequently it is just going to aggravate the problem even worse. We are extremely frustrated with that BIA decision, and we need to make sure that we communicate not only to improve the system, but that there is some shortfall funding restitution of this that needs to be addressed and resolved by Congress.

We believe the system can work if we strengthen it. We believe that through consultation with the tribes, we can make the system work so that we are all content with the system. We believe that if many of the recommendations that are being presented to you and to this committee are adhered to and incorporated into this amendment bill, that we can make a lot of strides in that direction. We believe this act is a dynamic act, and that this would make some significant steps into our utilizing this act more effectively with the pursuit of our self-sufficiency and self-determination goals.

I have a couple of recommendations that I would like to share with you, and I also have another item that is important to us and that I have been directed to incorporate in the record here as a member of the Affiliated Tribes of Northwest Indians. In this whole process we have been trying to work with the present administration and the Bureau of Indian Affairs, and we have been extremely frustrated, to say the least—actually to understate it—and particularly with the existing Assistant Secretary of the Interior.

I have been asked to request and urge the support and assistance of this committee to request the resignation of Ross Swimmer, basically on the basis that he has not consulted with us, that almost all of the initiatives that he has proposed all have very devastating or negative impacts on our programs and on our people, and that he has not consulted nor has he worked with us whatsoever. In our judgment, he doesn't intent to, and our experience is that it will not happen and it will not work.

We do not mean this to put any kind of damper on the long-range goal of this committee's objective. We consider this effect to be two-fold. We feel that we need to get a problem out of the way which is short term. We identify Ross Swimmer with that problem.

We identify this amendment as a long-term resolution that will create stability for us that will keep any arbitrary actions or personal philosophies of assistant secretaries out of the way and that the intent of the act itself will be what motivates and what drives the implementation of it by the tribes themselves so that we are making decisions for ourselves and that the discretion of how to implement the Self-Determination Act will be ours and not high-level Bureau officials. I want to leave it at that particular point.

The other recommendation that I have is that when we conducted our study, the study revealed that there is a deficiency of about $10 million in the IHS budget with regard to the indirect cost, there is a deficiency of about $12 million in the Bureau of Indian Affairs. That basically has been starting since fiscal year 1985, when the whole grandfathering process took place and has been aggravated ever since then to this date, and that is why there is a considerable amount of deficiency of those fundings.

I am requesting consideration of the protection of the tribes' budgets, our base budget. What has already been shared with you, and I am sharing with you again, the tribes need to have total discretion about how their funds are being spent, and we need to have assurance that the Indian Priority System will be adhered to and be protected. We want to have assurance that our money base is there and cannot be tampered with by the Bureau.

In our judgment, if only one-third of the total amount of money that goes into the BIA gets down to us, we feel that we should have the protection of those funds and as we continue to embrace or absorb more of the Bureau, then those funds should be protected. But right now we have no protection whatsoever, and we would like to try to correct the system so that we will have that kind of protection.

I think I will leave it at this point. I will cut myself short here.

[The prepared statement of Mr. Allen appears in the appendix.]

The CHAIRMAN. Do you know when your report will be available to this committee?

Mr. ALLEN. We are going to—we are circulating the last draft right at this moment. The three of us are editing it before we leave Washington, DC. We are going to send it out this Friday to the tribes for one last review. We intend to do the final editing in approximately 2 weeks, and then we figure we will have it published by the middle of May.

The CHAIRMAN. Thank you.

Mr. Sizemore.

STATEMENT OF JIM SIZEMORE, CERTIFIED PUBLIC ACCOUNTANT, MADRAS, OR

Mr. SIZEMORE. Thank you, Senator. My name is Jim Sizemore, and I have been involved with this process for about 10 years now. I am very excited to be here and thankful to have an opportunity to speak to this committee. I have worked with several bureau task forces over the years to try to straighten out the regulations, and I think this is the proper level at which maybe some of these problems can be fixed.

I am here to address the indirect cost issue more technically today, and I want to point out two major issues related to the indirect costs. The first item is that indirect costs in and of themselves are not a problem. One of the biggest problems with the use of indirect cost rates, however, has been the failure of Federal agencies, and particularly in this case BIA and IHS, to adequately fund them.

In order to demyth indirect costs in such a way that people would understand them, we have done an analysis in the Portland area of what made up the indirect costs that tribes negotiated into their indirect cost rates for fiscal year 1985. Page 2 of my testimony points out what made up those indirect costs. It points out that there was approximately $22 million of indirect costs for 36 tribes and that they were made up primarily of facilities, management administration, and general costs such as insurance and legal services. It also points out that many of these costs are federally controlled; in other words, the standards for systems that tribes are required to operate are set by the Federal Government.

Further analysis looked into the total contract costs for that year and pointed out that the average rate for tribes to about 36.5 percent for that year would have achieved about one-third of the indirect cost rates coming from the Bureau. In other words, the Bureau's share of the $22 million would have been about $7 million.

On page 4 we point out what the Bureau contracts were for those 36 tribes and point out that the indirect cost rates would have achieved about 21.3 cents of each contract dollar, reimbursing indirect costs. Because of the shortfall in that year, tribes spent about $33 million, and because they could not recover their full costs, they received about 97.8 cents on the contract dollar spent. What this means to tribes with no resource is that they are in debt.

As new contracts have been added and inadequately funded since 1985, that deficiency in the Bureau has risen to $12 million, and in the IHS testimony last year pointed to a deficiency of $10 million.

So one of the first recommendations we make is that this committee support appropriations to right a wrong that has been festering since 1985.

The second issue I wanted to address is the allocation of funds when a tribe contracts on the basis of indirect cost rates. Because IHS and BIA do not know what it costs them to deliver program services at the reservation level, they have relied on indirect cost rates to attempt to achieve the provisions of the law that require that when a tribe contract it not receive less than the Government would have spent.

If I can turn your attention to page 6 of my testimony, what I would like to point out is that funding a tribe on the basis of their indirect cost rate will not achieve the provision of the law, the reason being that the tribe, when they contract, would be contracting for a program that would be identified by column 1. As you can see, the bulk of the costs associated with the program fall somewhere else in the Bureau's budget or in other departments of the Government.

When the tribe takes this contract, even if they included every item listed under indirect costs in their rate, they would still be shortchanged because of the fringe benefits or the payroll costs that are pulled off at the top at the central office when the Bureau operates this program.

The point we are making here is that also the Bureau pulls back somewhere between 5 and 15 percent of column 1 to monitor the program when a tribe contracts this program. So frequently, they don't even get all of column 1.

Our recommendation would that a revised system of allocating funds be established that requires that when a tribe contracts, they do receive all of the program costs in column 1 plus an additional allocation which would pay for the fair share of that program's related costs as indicated by all of the other columns. This would then achieve the intent of 106(h) of the act, which would bring parity to the program when the tribe contracts it. We believe that to do less than that is naturally going to require the tribe to either subsidize the program with their own money or to reduce the services to their people by contracting the program.

Once that program is initially contracted, we would recommend that the total allocation for that contract then be made available to pay both the direct and indirect costs of the tribes, and then that amount of money be isolated and protected from the bureaucrats thereafter.

That concludes my comments, Senator. Thank you.

[Prepared statement of Mr. Sizemore appears in the appendix.]

The **CHAIRMAN**. On page 4 of your analysis, I presume the first column is the rate that you have negotiated. Is that what it is?

Mr. **SIZEMORE**. On the page 4 analysis?

The **CHAIRMAN**. Yes.

Mr. **SIZEMORE**. Mr. Chairman, the first column, which is the cents column, reflects how many cents of each contract dollar these particular items cost, based on the tribes——

The **CHAIRMAN**. This is actual cost, not negotiated cost?

Mr. **SIZEMORE**. This is the negotiated costs the Government would have paid had they paid the full rate of the tribes. That does not include all of the tribes' costs because not all of the tribes include all of these costs in their indirect cost rate.

The **CHAIRMAN**. What are they paying now?

Mr. **SIZEMORE**. Mr. Chairman, the amount that was grandfathered for this particular year was about 89.8 percent of the indirect cost rate that would have been achieved by the negotiated rates. Since that time, allocations for the new contracts for 1985, 1986, and 1987 have been deficient by even further than that. Our latest estimate for 1987 new contracts is that they will achieve 68.5 percent of what they should have achieved.

The **Chairman**. So you are carrying out responsibilities of the agency and not getting paid for it? Is that what it amounts to?

Mr. **Sizemore**. Mr. Chairman, we are pointing out that the Bureau's failure to ask for enough money or, if they did ask for enough money, OMB's reduction of their request resulted in an underfunding of indirect costs which resulted in the shortfall.

The **Chairman**. All right. I have questions from Senator Evans. What is the average percentage of indirect costs that go to pay for insurance?

Mr. **Sizemore**. Mr. Chairman, I don't have that particular number with me. But looking at this, it would be around between 3 and 4 percent.

Mr. **Allen**. That's about what ours is.

Mr. **Sizemore**. Now, that is as of that time. Most of the tribes report a three-times increase in that cost since this study was first conducted.

The **Chairman**. To what extent could indirect costs be reduced if tribes were afforded the same protection from tort liability Federal agencies enjoy under the Federal Tort Claims Act?

Mr. **Sizemore**. Mr. Chairman, I am not an attorney, so I don't know what insurance policies tribes could avoid by that protection. I do know that tribes have a multitude of different insurance coverages, including malpractice liability, fire, auto, flood, every kind of insurance imaginable. Some of those are directly charged. For example, in a health clinic malpractice insurance might be a direct cost. So I couldn't answer that question precisely.

The **Chairman**. OK. Thank you very much.

Our next witness is the deputy director of the Columbia River Inter-Tribal Fish Commission, Mr. Lloyd Coon.

STATEMENT OF LLOYD COON, DEPUTY DIRECTOR, COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, PORTLAND, OR

Mr. **Coon**. Thank you, Mr. Chairman. I appreciate the opportunity to be here to express our views. I also wish to commend you and the committee for the method which you are going about soliciting our views in putting together your amendments to this very important act. I will be talking today on the funding issue, and primarily on the Indian Priority System [IPS].

The Indian Priority System is a system used by the Bureau of Indian Affairs to set priorities for both funding allocations and funding cuts. The system is a result of language contained in the original Wheeler-Howard Act and also in Public Law 93–638. Ron mentioned the process whereby the tribes 2 years in advance go about trying to determine what their priorities and needs are going to be 2 years from now. The IPS, if it were correctly used and honored, would provide a method for the tribe to do consistent, long-term planning that would enable them to address their specific local needs. Unfortunately, however, in the actual implementation of the system, this has not occurred.

There is a number of ways that the system has been violated, but the largest one and the one that has been the most damaging to the tribes is unilateral changes at the central office level of the

Bureau of Indian Affairs to the IPS or the priorities as established by the tribes.

The quickest way to illustrate this is to use the example of a very small tribe which I am aware. I am particularly acutely aware of what happened here. This tribe is remotely located 200 miles from the nearest BIA installation. It does not have a HUD Housing Program. The only housing that it had was a small group of houses that had been built by the BIA in 1931. That was all the housing that they had to meet their needs. Having been built in 1931, obviously the houses had fallen into some disrepair.

The tribe considered this its number one priority, trying to provide decent housing to its membership. So they subsequently allocated a great percentage of their otherwise small base into the Housing Improvement Program [HIP]. They have done very well with it. They rehabilitated most of those old houses. They also used portions of that money to provide seed moneys to individual members to build new housing that they then owned under a project with the Farmers Home Administration.

This project was going along and doing very well, all of a sudden the BIA decided that we're not going to have the HIP in the band analysis anymore. It's no longer going to be part of the IPS. They jerked it out. The tribe's actual allocation after that was about 10 percent of what they had originally put in the priority system. But worst of all, their base was eroded by 25 percent. The program cut was made to their base. So here was a tribe that had a little over $200,000 in its total BIA base and had 25 percent of it jerked away.

This was an instance that happened to one tribe, but we could go on and on and tell you about a great number of tribes that this also has happened to. Now, this was a capricious act on the part of a single Bureau official in a successful attempt to maintain control over a program.

The other example that Ron used was the Public Law 93-638 grant process. Somewhere along the line somebody decided that this program was no longer needed. Many of the tribes were using this to fund their infrastructure, to fund their managerial systems, funding the development of their tribal government capacity. This also has been going through a period of cuts and will be eliminated totally in 1988.

In addition to these program type things, there have been other raids on the IPS which has resulted in a constantly eroding base overall. Overall target levels that get to the agency tribe level have decreased about 3 percent in the last 3 years, and the 3 percent is not an accurate figure because of additions that have been made to the IPS by taking previously non-IPS programs and putting them into the overall base.

The other raids have been made to cover increased Bureau costs that were not funded by Congress such as ADP increased FTS, workers compensation, unemployment, and what they call "grade bulge," this is where a Bureau employee has been in a position for a period of time and gets an automatic in-grade increase. That has generally been absorbed in the IPS but out of the tribe's base.

The amount of money that actually gets to the tribes has been going down even considerably more than the 3 percent.

What all this leads to is the fact that the tribes need, if they are going to be responsive to the needs of their members and effectively carry out these programs, they need a sound, stable base on which to operate and they need to be able to rely on it. The IPS, as envisioned, would do that very well if it were honored. What we are requesting from you, from this committee, as you go through your amendments is to put a provision in there that would assure the tribes of a stable funding base, one that they could rely on and that the Bureau would be required to honor. Thank you.

[Prepared statement of Mr. Coon appears in the appendix.]

The CHAIRMAN. I gather that this committee has been made aware of the difficulties you have had with the IPS as administered by the Bureau, and I think our records would indicate that we have communicated our concerns. But on each occasion they have responded and justified their action. This time I do not intend just to send a letter. But in order to make it a bit more effective, it would be most helpful if you could work with us in our communication with the Bureau. If the response is not satisfactory, I certainly realize that there are other ways of communicating, but we do not wish to take the other ways of communicating.

Mr. COON. Unfortunately, as of late that appears to be the only method of communicating.

The CHAIRMAN. No; there are other ways of communicating this. [Laughter.]

So the staff will be calling upon you people for assistance in this area. I think the time has come to go beyond just letter-writing.

Our next witness is Mr. George Shelhamer, finance officer of the Rosebud Sioux Tribe.

STATEMENT OF GEORGE SHELHAMER, FINANCE OFFICER, ROSEBUD SIOUX TRIBE, ROSEBUD, SD

Mr. SHELHAMER. The Rosebud Sioux Tribe has a little different circumstances than most of the witnesses. We live in a very isolated area. The country in which the headquarters is listed is totally Indian country. There are three additional counties in the State of South Dakota which are within the areas of Indian country. The source of income is grass, which isn't selling that well these days. It has caused us some problems which are slightly unique with regard to what we have heard from some of the other people.

Some of my testimony may seem to be in conflict with Mr. Martin's testimony, but really it is not. His situation is just different than our situation.

I would like to go over the basis for indirect cost recovery, what indirect cost is, how it's secured and how it creates problems for at least the Rosebud Sioux Tribe.

The basis for indirect cost recovery is the Office of Management and Budget Circular A-87. It defines indirect costs as being those costs which are not within the area of being cost efective to distribute to the contracts with the Federal Government. A-87 also provides for the Health and Human Services Document OASC10, which gives the format for proposals and how indirect costs are related and so forth.

The CHAIRMAN. Do you agree with a prior witness who said that you were unwilling sellers——

Mr. LONE FIGHT. Yes; I do. I agree.

The CHAIRMAN. And they were threatening buyers?

Mr. LONE FIGHT. I agree.

The CHAIRMAN. Are you suggesting that members of your tribes seriously believe that they had no choice?

Mr. LONE FIGHT. We had no choice.

The CHAIRMAN. That if they did not agree it would get worse with the passage of time?

Mr. LONE FIGHT. That's correct.

The CHAIRMAN. Is is also true that before the agreements were signed and the negotiations concluded, the Corps of Engineers began the construction?

Mr. LONE FIGHT. This is written testimony, written record.

The CHAIRMAN. What was the nature of that construction?

Mr. LONE FIGHT. I'm not really at all sure, because—I'll have to ask my attorney to address that.

Mr. CROSS. Thank you, Mr. Chairman. The process, as you know, for project authorization was such that the studies, in fact the entire Pick-Sloan Plan which cited the five main stem dams, including the major control dam, or the high dam, Garrison on Fort Berthold, was all done without consultation with the Indian people and was completed by December 22, 1944, and embodied in the Flood Control Act of that year.

The CHAIRMAN. There were no public hearings?

Mr. CROSS. There was no public hearings. There was testimony by Bureau of Indian Affairs personnel. And they indicated that there was going to be substantial impact on the Fort Berthold people. In fact——

The CHAIRMAN. Did the Bureau of Indian Affairs agree or disagree with the plan?

Mr. CROSS. They indicated that their position was that it was too bad that the Indians had to remove, but some future provision should be made for their reestablishment. That was the sum and substance of their testimony and we have that legislative history available.

The CHAIRMAN. Did they conduct themselves like trustees of the Indians?

Mr. CROSS. I don't think that any objective observer would say that their primary interest was the well-being of the tribal people. I think their interest was to work with the Corps of Engineers to set a scenario, a convenient scenario, not for the Indians, but for the Corps of Engineers, the War Department and the Bureau to effect the removal with as little fuss as possible.

The CHAIRMAN. Then you're saying that the advocacy of the cause of the Indians was insufficient?

Mr. CROSS. I'm saying, Mr. Chairman, that the process, the political process that was put into place, that it began with the adoption of the Pick-Sloan Program on December 22, 1944, provided no point of access for the tribes to influence that. In 1946 they prevailed on Congress to impose the Indian clause limitation, on the direct construction of the Garrison Dam itself. Colonel Pick, the representative, the primary representative of the Corps of Engineers, proceeded to build the project sites such as Riverside, proceeded to put in all the infrastructure into place that represented subtantial investment so that in a sense, the Government was already committed to building Garrison, but that they didn't run afoul of the letter of the law by building the dam itself, by having the bulldozers come in to clear the way for the large earth-filled dam known as Garrison.

What happened then, was that the War Department was required under the terms of that mandate to provide a replacement reservation. They just couldn't do that because those lands weren't available any more since the hydraulic system imposed rendered no bottom lands available on the Missouri River anywhere. Instead they offered uplands, they offered bad lands, and those were rejected as insufficient by the Secretary of the Interior on behalf of the Indians.

The next year after that, after that attempt was made, the War Department prevailed on Congress to remove the Indian clause limitation on the direct construction of the dam itself. So, by that time the die was cast. There was no choice for the Indians but to remove. The only issue remaining then, was the negotiation itself of the amount of money involved. As you've already heard, Mr. Chairman, the amount of money involved kept going down. So, the prudent person, including the tribes, are saying, gee, despite all the evidence, despite the MRBI Reports, we had best take a hard look at the settlement terms offered. And, in fact, the Settlement Act, 81-437 was termed in such a way that if the Indian people on Fort Berthold did not vote to accept it, the money appropriated for that purpose would then fall back into the Treasury. So, that it was to pardon the phrase, legimately on a take it or leave it basis, it was a situation in which the tribes, if they didn't accept the terms of the Settlement, which they had very little role in influencing, would have nothing and they would still be removed.

The CHAIRMAN. During the, quote, "Negotiations", end quote, were the tribes represented by legal counsel?

Mr. CROSS. Yes. They were represented by legal counsel, but at a very far distance. In other words, they were represented by a legal counsel in Washington, DC. The ability at that time of the legal counsel to sit down with the tribal people back in those days, to understand their perspective, may have been influenced by factors that perhaps should't have influenced them. One factor is that he, as well as the Indians, noticed that the trend of the settlement offer, aside from the MRBI context, which had set out a fairly costly and complex rehabilitation plan, that was not being observed by the——

The CHAIRMAN. Was the counsel retained by the tribes?

Mr. CROSS. Yes, it was.

The CHAIRMAN. Did the counsel recommend that the tribal sign on?

Mr. CROSS. The counsel reluctantly recommended to the tribes people that the accept the terms of the Settlement Act, because removal was imminent. As you realize, the construction was proceeding and by 1951 the dam was substantially complete. So, that the prospect that faced the Indian people is to be removed, but left destitute without any money that would substitute for their lifestyle and their income that they had on the historic reservation.

The CHAIRMAN. Did the Indian tribes petition the Congress?

Mr. CROSS. Yes; they did.

The CHAIRMAN. When was this?

Mr. CROSS. The tribal delegation made numerous trips, several trips back and, one of the successful trips that they made was to consult with their Congressional delegation. And then the "lieu lands" proposal was put into place in 1946. We have documented history of that approach. The concept then was provided a replacement reservation so that literally, both in terms of quality and quantity, the economic base of the tribe would be replicated. Those lands were not available after the War Department, or the Secretary of War made several offers. Those offers were rejected and properly so, by the Secretary of the Interior, as not comporting with the statutory mandate of quality and quantity.

The CHAIRMAN. Apparently the Congress did not respond too positively. It went from the prior $17 million to $12 million?

Mr. CROSS. That's exactly right. What happened is that, in terms of looking at the formula that would have to be taken into account, the MRBI background and those other reports that were expert analysis of the feasibility and the costs of removing the Indian people, is that, and I think quite frankly, Mr. Chairman, it was done not in terms of any sort of rational process of determining what would be necessary to reestablish those people, the Indian people, it was done with an eye toward budgetary limitations. It was done with an eye towards what would be the cheapest way to do it.

The CHAIRMAN. As an attorney, what is your comment on the Secretary's suggestion that this matter should be resolved in the courts?

Mr. CROSS. Let me tell you what my response to that is. Originally the tribes, in their dealings with the Corps, and as you know after the "lieu lands" options faded simply because they were not available, the Corps was then authorized in Public Law 296 to negotiate. Well, in fact an amount was put into that law as a top dollar amount, a top dollar amount, $3.7 million for land acquisition, $1.5 million as the relocation costs. These were the top dollar amounts that formed a base line of what the Corps could do. They were going to treat the tribes as if they were mere private condemnees, without respect to the damage to the treaty purposes, without respect to the ability of the tribes to reestablish themselves on the reservation and carry on, as they did before on the historic reservation. That amount was capped.

What happened was that the issue for just compensation under that approach was to be left for the courts. When that contract was submitted back to Congress, Congress rejected that. They said, we do not want to leave the issue of just compensation open to the courts to decide. Congress then made the decision to decide for itself how much just compensation was appropriate. They took the issue out of the hands of the courts and decided, as a matter of legislative fiat, what amount would accord with the just compensation.

If you take a look at the title of Public Law 81-437, the Taking Act, you'll notice that in the title of the act it was dual purposes. One is to vest the title to certain described properties in the name of the United States from the tribes. The other purpose in its title of the Act itself, is to provide just compensation for that. Congress, itself, took the responsibility away from the courts, cut off the rights of the tribes to go to court to decide the issue of just compensation, took on the role of deciding what just compensation was under the context. But, as you know, Senator, many times Congress responds to pressures not from a disinterested point of view, responds not as a court, a neutral court would, but responds, unfortunately, to influences that make it hard for that body to be the appropriate body to decide what level of just compensation is.

If you'll notice, and the legislative history is available, there was no rational just compensation approach to why the money went from $30 million to $17 million to $12.6 million. All the Indian people know the amount was going down, and not in incremental amounts, but in substantial amounts. So, I think the answer why the Indians couldn't go to court, was because Congress cut off that access. There are still jurisdictional barriers so that if the root of Congressional reference that Mr. Swimmer suggested would be available, the Congress, itself, would have to act to remove those jurisdictional barriers and provide the access in the Court of Claims by Congressional reference.

I don't think that's the appropriate way though, Mr. Chairman, for this Congress to proceed. I think that you have a reasonably, considerate, thoughtful report from a Federal Commission, two commissions, the GDUC, a Congressional Commission authorized under Public Law 98-360, a Secretarial Commission that studied the particular claims, and that this thoughtful, considerate report should be accepted by Congress as the base line way of dealing with these problems. They spent time, they heard expert testimony, they had hearings. And, I think we should use that as the base line approach and use the springboard of how the tribe would like to adapt, realizing the problems now with the budget deficit. Those same problems that prevented the tribes from getting just compensation in 1949, because of budgetary pressures. One more time, a reasoned analysis of what just compensation is from experts is going to potentially go by the wayside because of those budgetary pressures.

The CHAIRMAN. Mr. Chairman, do you, as the legal officer of the Three Affiliated Tribes of the Fort Berthold Reservation, approve and accept the recommendations of the Joint Tribal Advisory Committee as it relates to your problem?

Mr. LONE FIGHT. Yes; I do.

The CHAIRMAN. Without reservation?

Mr. LONE FIGHT. Without reservation.

The CHAIRMAN. I will do my best to convince my colleagues on this committee and on the other committees to do likewise.

Mr. LONE FIGHT. Thank you very much.

The CHAIRMAN. I thank you very much.

Before proceeding with the chairman of the Standing Rock Sioux Tribe, I'd like to note the presence in this committee room of the traditional tribal elders of the Hopi Indian Tribe. We welcome you, gentlemen. Thank you very much.

Now, I would like to call upon the chairman of the Standing Rock Sioux Tribe, Mr. Charles Murphy, and he will have with him, Mr. Al White Lightning, chairman of the Tribal Select Committee on Water and member of the tribal council, Mr. Robert McLaughlin, and Mr. Everett Iron Eyes.

STATEMENT OF ALLEN WHITE LIGHTNING, STANDING ROCK SIOUX TRIBE, CHAIRMAN, TRIBAL SELECT COMMITTEE ON WATER, AND MEMBER OF THE TRIBAL COUNCIL

Mr. WHITE LIGHTNING. Thank you, Mr. Chairman. I regret to inform you that Mr. Murphy is not able to make it. He has laryngitis. Mr. Chairman, for the record, you have a copy of the testimony that we have provided you.

The CHAIRMAN. Without objection, your whole statement will be made part of the record.

Mr. WHITE LIGHTNING. Thank you, sir.

I believe the majority of the documents that we have provided to the committee and also to the Bureau of Indian Affairs, along with the other agencies, without——

The CHAIRMAN. All relevant and appropriate documents will be made part of the record.

Mr. WHITE LIGHTNING. Thank you, sir.

There were several questions that you had earlier, Mr. Chairman, relative to Sitting Bull's grave, and I'd like to very briefly apprise you of that.

The CHAIRMAN. Please.

Mr. WHITE LIGHTNING. As a result of—in 1953 the Mobridge Chamber of Commerce out of South Dakota attempted to steal the body of Sitting Bull from Fort Yates Burial Grounds. They did take a body, but of a U.S. soldier that was buried next to Sitting Bull. Presently, the grave of Sitting Bull is about 10 feet from the backwaters of the Oahe, sitting in Fort Yates.

It was ironic that the Army Corps of Engineers, General Dominy, I believe his name is, when we talked earlier about the Oahe Dam, he indicated that there was recreation. There is no recreation development of any kind within the boundaries of the Standing Rock Indian Reservation.

The other thing I wanted to bring up, Mr. Chairman, is that during this period of time that the Bureau of Indian Affairs was carrying out its trustee responsibilities, there was an individual by the name of Mr. Commission Dillon Myers. Mr. Myers was the Commissioner of the Bureau of Indian Affairs during this time, but immediately prior to that he was in charge of the Japanese Relocation Program. And, it's very unfortunate.

I also want to indicate to you, you know, the Army Corps of Engineers—in the City of Fort Yates, it is completely surrounded by water, the backwater of it is—and there's another community of Wakpala, South Dakota, that's flooded annually. We have been complaining or submitting requests to the Bureau of Indian Affairs. We have yet to get that rectified.

The **Chairman**. Just for the record, I couldn't quite hear you properly. Did you say that somebody wanted to steal the remains of Chief Sitting Bull?

Mr. **White Lightning**. Yes, sir; the Chamber of Commerce of Mobridge, SD, they still have this story once and a while, that they printed in the Mobridge Tribune, you know, telling how that they got the remains of Sitting Bull and they have a statue of him on the North side of the city facing south. So, they have their little story, and the truth, our elders tell us that nobody was taken, no Indian body was taken, it was the body of a soldier, that was stationed in Fort Yates at the time.

The **Chairman**. So the remains of Sitting Bull are still———

Mr. **White Lightning**. Still in Fort Yates———

The **Chairman**. At Lake Oahe?

Mr. **White Lightning**. Well, almost going under as a result of the backwater from the Army Corps of Engineers.

I wanted to, Mr. Chairman, you know, the General and the Assistant Secretary both made reference to excess lands. Presently we have lands that Army Corps of Engineers never committed as taken area that is flooded. We have present lands that the taken area markers are sitting on top of hills and alongside of hills, and if the flood ever came up that far, just like Mr. Pat McLaughlin, former chairman of Standing Rock Sioux Tribe said, Goodbye St. Louis. It's way up there.

I wanted to include in the—before you, Mr. Chairman, are comments relative to the reserve water rights. And I would like to read this particular portion of it: The Standing Rock Sioux Tribe notwithstanding any part of Public Law 98-360, or any part of the final report of the Garrison Unit Joint Tribal Advisory Committee does not accept any diminishment of the quantity of water from the Missouri River, which the tribe may beneficially use pursuant to the Winters doctrine or any rights we have under Federal law existing and consistent with the U.S. treaty commitments with the tribe. The tribe further holds the principle that water in sufficient quantities is inseparable from the principle of further development to the tribe and its people. Integral with the above is that the Winters reserved water rights held by the tribe are exempt in whole and in part from any and all provisions of the so called McCarran amendment.

That, Mr. Chairman, I'd like to bring before you. However, at this point, Mr. Chairman, just going back to No. 1, is that the tribe, when we met in tribal council, has instructed me to present to you the one that they place as a high priority, is the No. 9 of the report, which is the just financial compensation for the economic loss incurred by the tribes as a result of the impoundment.

I'd like to set the record straight on certain comments made by the Assistant Secretary relative to that particular issue. At this point, I would like to introduce Mr. Robert McLaughlin. We have engaged him to work with us as our economic advisor.

[Prepared statement of Mr. White Lightning appear in the appendix; related documents are retained in committee files.]

The **Chairman**. Mr. McLaughlin.

STATEMENT OF ROBERT McLAUGHLIN, PRESIDENT, ROBERT McLAUGHLIN CO., SOLEN, ND

Mr. McLAUGHLIN. Thank you, Mr. Chairman. All throughout, Mr. Chairman, several comments have been made with regard to the just compensation issue. I disagree with the testimony by the representative of the Corps of Engineers. I disagree with the testimony of Mr. Swimmer and others who commented on the just compensation issue.

What I found in my analysis of economic loss, was the Corps of Engineers did not utilize economic cost benefit analysis the way it should be used. They simply did not take into consideration the opportunity costs for that public project. In our case, it would be the Oahe Dam. What I mean by this, is in 1951, for example, Kansas City had a flood, and a representative from the Corps of Engineers in 1951 appeared before the tribal council and indicated that the dam would be going forward and at that time several members of the tribe, the tribal council and other representatives of the tribe, asked what benefit, why do this, why build this dam, why flood our homelands, what benefit would that be. And the Corps of Engineers representative said, well, just 2 months ago a flood occurred in Kansas City and there was $1 billion in loss, and for the good of the people downstream, we consider that a benefit.

Well, in their analysis they simply forgot to include the analysis of the opportunity costs for that structure. What would happen, the tribal officials said, what is the difference, you then would go flood our land. We would have a permanent flood. That flood would last for 100 years. Those are costs that we would incur. That's a price that we would pay. Now, that was a commonsense statement, but it's well founded in economic theory in cost benefit analysis theory, and the Corps and the Bureau of Reclamation simply did not calculate those costs.

But, I did. I went back and I looked at the costs that occurred to us in 1951, and established market values for those costs and they come up to be a substantial amount. The just compensation price that the Corps of Engineers recommended was, and that Congress finally approved and provided to the tribe, was $1.9 million or $36 an acre. My determination showed that the foregone resources, the opportunity costs for that flood, the permanent flooding of the homelands and the removal or the tribe from our homelands, the price, and this is very conservative, because there are other ways to calculate it, and I think it would go into the billions of dollars, but I don't think Congress would entertain that kind of compensation, was about $59 million in 1951 prices, and then we amortize that out to current day, and that was $361 million. And I think that's a very conservative estimate of the economic loss incurred by the tribe for the removal.

The key point here in terms, and I don't know if the Corps of Engineers official is present, is that the tribe was not in the marketplace. It was being permanently removed from an irreplaceable economic value, the hunting, the farmland values, the berries, the medicine, everything was now being permanently removed from the tribe. There was no, as the witnesses from Fort Berthold pointed out, there was no replacement. That's a very important theoretical and practical consideration from cost benefit analysis. That's very important.

When then you do the analysis, you then have to pay for that. That is then a social bed, and that is compensated by opportunity pricing, and we do this through a mechanism called shadow pricing. So, I think that the Assistant Secretary is clearly wrong in all of his statements and I will sit down with him, if he so desires, and explain just what cost benefit analysis is and how it's supposed to be practiced, and that we can attach and estimate pretty accurately what the value of that loss was at that time in 1951.

The CHAIRMAN. I would hope that you will sit with the Assistant Secretary. I would also hope that representatives of the Three Affiliated Tribes would also do that. And, in each case we will have committee representatives sitting in to make certain that these meetings are meaningful and with a goal of some productivity.

Mr. MCLAUGHLIN. Mr. Chairman, I would like to comment on Mr. White Lightning. I know, maybe he is reluctant to do so. I also attended the meeting with Assistant Secretary Swimmer. I wish he would have stayed around, because it is now our opportunity to comment on that meeting.

Mr. White Lightning mentioned that he laughed in our face. Well, that's a figurative statement. We presented to him a proposal to develop a financial institution, a development financial institution, and he called it a foreign aid package and said that our submission was going to be nothing but three meetings and three conferences and summarily dismissed us from his office with those kind of comments. And, we took great exception to this. It was simplistic thinking on his part and it was demeaning to us as tribal representatives, when his own staff asked us to come in and propose that to him. So, we were very concerned about that behavior. We hope, and he's indicated that he would meet with us in a rational kind of way, and we certainly hope he does, but if he's going to continue to treat us in that fashion, it would be difficult to carry on a sane conversation or a logical, reasonable conversation with the gentleman.

The CHAIRMAN. If the Congress should decide to involve itself in the resolution of this problem, one of the key decisions that we will be called upon to make will relate to the price tag. You have indicated that the appropriate price in 1951 was $59 per acre.

Mr. MCLAUGHLIN. The price that we determined at the taking time, 1959 is when the papers were signed.

The CHAIRMAN. 1959?

Mr. MCLAUGHLIN. Yes; the negotiations started in 1959, when they sent the team from the Bureau of Indian Affairs and Corps of Engineers.

The CHAIRMAN. You maintain that amortized would come up to $300 plus million?

Mr. MCLAUGHLIN. Yes; we utilized Treasury rates in amortizing it from 1959 to today. The price per acre, just off the top of my head, in 1959, we estimated approximately $60 million, so you would divide 56,000, so the price per acre would be about $1,000 for the true loss.

Let me also comment, and this is very interesting. When the Corps of Engineers—we went back to them 10 years later in 1969 to lease, you know they do practice—they have an enterprise, they administer power, they sell it, they lease land, they get revenue for that. And when the tribe went back to establish an economic project in what is called the taking area, the land that they purchased for just compensation for $36 from us, 10 years later we went back to negotiate to put in a recreation facility. And, they valued that land at $5,000 an acre. And, they were going to lease it to us based upon the capitalization of a $5,000 per acre price. So, they clearly know the value. I mean, 10 years later they valued it at $5,000, when they purchased it from us for $36. So, they clearly know the value of the tract of land.

The CHAIRMAN. Well, they know it's worth more than $59.

Mr. McLAUGHLIN. Oh, certainly. And, we told them that we couldn't afford it and we moved the facility off the taking area onto a hill on our trust land. We just simply couldn't afford to pay their, what we called an unreasonable lease rate for the land that they had purchased 10 years earlier for $36.

The CHAIRMAN. If you were in charge of the negotiating team from the Standing Rock Sioux Tribe, what is the bottom figure that you will not go below?

Mr. McLAUGHLIN. Oh, I could not—that would be a matter for the tribal leaders, the tribal council. I couldn't say.

The CHAIRMAN. Is there a bottom number, Mr. Chairman?

Mr. WHITE LIGHTNING. I would tend to think that the amount proposed in our study would be the $361 million would be a conservative fugure that we would probably look at.

The CHAIRMAN. We will look at that, but I'm also a realist and if I know the Budget Committee and the White House, that would be rather difficult to fly around here.

Mr. WHITE LIGHTNING. We understand that, sir.

The CHAIRMAN. Can you think of another number that might fly? I would suggest, if we are to seriously consider this, we will have to come up with a price tag. That's the first question they'll ask me on the Senate Floor. And I don't want to come out with a number which is of my own making. I would like to come out with some number that is the result of consideration and determination by your tribal council. So, I may call upon the two chairmen to seriously consider this, and after careful thought, communciate what you consider to be fair under the present circumstances.

Mr. McLAUGHLIN. Mr. Chairman, there is a mechanism that one can go back and, I suppose, negotiate on the—our actual just compensation in 1959 was $59,083,000. Well, my recommendation to the tribe was that we use—tag the amortization schedule to the Federal Treasury rates. The tribe could consider some other mechanism to amortize that out into the future. That would be a way that——

The CHAIRMAN. That's $59 above what they gave you?

Mr. McLAUGHLIN. No; that was $59 million—they provided $1,900,000 in just compensation at $35.60 an acre and they also provided damage money as was discussed earlier, and that was in the amount of about $3,600,000. So, the sum total they provided to us, which would be—is subtracted out was $5,251,000. The bottom figure that still is what our calculation showed remained to be paid us in 1959 is the $59 million figure. And, then we amortized that out using Federal Treasury rates, and I'm suggesting that maybe another rate could be applied here. I certainly will recommend that or discuss that with the tribal council.

The CHAIRMAN. Mr. Chairman, do you have anything further to state?

Mr. WHITE LIGHTNING. No, sir; we have all the records here——

The CHAIRMAN. I'll ask a formal question.

Mr. WHITE LIGHTNING. Sure.

The CHAIRMAN. Do you, as chairman of the Standing Rock Sioux Tribe, accept and approve the recommendations of the Tribal Advisory Council without reservation?

Mr. WHITE LIGHTNING. With one exception, sir. The acreage, 2,380 irrigable acres identified within the Public Law 99-294, does not represent the potential total acreage on the reservation. At the present time there are ongoing soils investigations that will identify future irrigable acreage. That would be the only thing that we would have a problem with, Mr. Chairman. However, we do agree with all of the other recommendations made by the JTAC.

The CHAIRMAN. Mr. Chairman, I thank you very much and your associates for waiting this long to testify, but the subject matter before us is obviously very important.

Mr. WHITE LIGHTNING. Yes, it is, sir.

The CHAIRMAN. And of major concern to the members of your tribe. I can assure you that I will make certain that members of my committee are made aware of your concerns, and would hope that we will come forth with a resolution that will please you, sir.

Mr. WHITE LIGHTNING. Thank you, sir.

The CHAIRMAN. The committee will stand in recess subject to the call of the Chair. The record will be kept open until April 15. So, if any of you have any additional documents you wish to submit, you may do so until noon, April 15.

[Whereupon, at 6:53 p.m., the committee adjourned subject to the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

FINAL REPORT OF THE GARRISON UNIT JOINT TRIBAL ADVISORY COMMITTEE

THE FORT BERTHOLD INDIAN RESERVATION
and
THE STANDING ROCK SIOUX INDIAN RESERVATION

MAY 23, 1986

I. EXECUTIVE SUMMARY

The Garrison Unit Joint Tribal Advisory Committee (JTAC) was established by the Secretary of the Interior to examine and make recommendations with respect to the effects of the impoundment of waters under the Pick-Sloan Missouri Basin Program (Oahe and Garrison Reservoirs) on the Fort Berthold and Standing Rock Indian Reservations. The Secretary's action implemented a recommendation in the Final Report of the Garrison Diversion Unit Commission (GDUC) established pursuant to Public Law 98-360, Section 207.

The Secretarial Charter which established the JTAC (a copy of which is included in the appendix) directed and authorized this Committee to examine and make recommendations with respect to the following items:

Item 1. Full potential for irrigation on the Fort Berthold and Standing Rock Indian Reservations,

Item 2. Need for financial assistance for on-farm development costs,

Item 3. Development of the shoreline recreation potential of Lake Sakakawea and Lake Oahe,

Item 4. Return of excess lands,

Item 5. Protection of reserved water rights,

Item 6. Funding of all items from the Garrison Diversion Unit funds, if authorized,

Item 7. Replacement of infrastructure lost by the creation of Garrison Dam and Lake Sakakawea and Oahe Dam and Lake Oahe,

Item 8. Preferential rights to Pick-Sloan Missouri River Basin Power,

Item 9. Additional financial compensation, and

Item 10. Other items the commission many deem appropriate.

The Committee held hearings on the Standing Rock Reservation and the Fort Berthold Reservation as well as several hearings in Bismarck, North Dakota, to receive testimony and evidence. The Committee, during the process of the hearings, was made aware of the accuracy of the observation of the GDUC that ". . . the Tribes of the Standing Rock and Fort Berthold Indian Reservations bore an inordinate share of the cost of implementing Pick-Sloan Missouri Basin Program mainstream reservoirs." See Final GDUC Report, Appendix F, P.57.

This report includes findings and recommendations which undertake, as the GDUC recommended, "to find ways to resolve inequities" borne by the tribes. The findings and recommendations relating to the two reservations are not identical due to differences in their respective circumstances. Nevertheless, some of the effects of implementation of the Pick-Sloan Missouri Basin Program were common to both reservations.

1. The Indians were not only unwilling to sell their land, but strongly opposed the taking of their lands.

2. The Indians felt intimidated by the fact that construction on the dams began before Indian lands were acquired. They then felt that the taking of their lands was inevitable.

3. During the negotiation phases, assurances were given expressly or by implication by various Federal officials that problems anticipated by the Indians would be remedied. The assurances raised expectations which, in many cases, were never fulfilled.

4. The quality of replacement homes was inadequate in many respects, but most notably with regard to insulation and construction necessary to meet severe climatic conditions. The deficiencies, in many cases, resulted in inordinately high heating bills.

5. In the words of GDUC, the Indian land taken was, "prime river bottomland" and the most productive parts of the reservations.

6. The quality of life enjoyed by the tribes on the river bottomlands has not been replicated in the areas to which they were removed. The dramatic rise in the incidence of stress-related maladies and illnesses following removal of the Indians is circumstantial evidence that there is a casual relationship between these effects and the removal.

7. The Indians intensely feel that they were not justly compensated for the taking of their lands and related benefits by the United States.

8. Land acquisition practice of the United States was to acquire land in rectangular units. This practice with respect to Indians and non-Indians was to acquire all lands below a specific elevation by rectangular survey, metes and bounds. This resulted in the taking of a substantially larger area of Indian land.

A summary of the findings and recommendations with respect to each reservation follows:

A. FORT BERTHOLD INDIAN RESERVATION

Items 1 & 2. Full Potential For Irrigation and Financial Assistance For On-Farm Development Costs.

Development of irrigation on remaining Tribal lands would reduce the Tribes loss of their economic base and good farmlands. Reconnaissance-level studies suggest that up to 107,000 acres could be developed. The first step of this development is 30,000 acres and should be an integral part of the Garrison project and should be included in any Garrison funding authorization legislation. In the event that the Garrison funds are not used, the Tribal project should still be built. Costs should be deferred by Leavitt Act provisions. On-Farm costs associated with the irrigation project should be included as capital costs and deferred by Leavitt Act provisions.

Items 3 & 4. Development Of Shoreline Recreation Potential And Return Of Excess Lands.

The Army Corps of Engineers (COE) took lands up to the elevation of 1854 msl and other lands above this elevation for the operation of Lake Sakakawea because land ownership is based on a rectangular grid system. Thus, a considerable amount of land above this maximum position level of the reservoir is managed by the COE. The tribes contend that this excess land is not needed by the COE. The COE on the other hand, insists that all the land is required to operate the reservoir and assure public access. There is considerable potential for recreation development as well as existing facilities on Lake Sakakawea. The Three Affiliated Tribes would like to develop docks, campgrounds, resorts, picnic areas, boat ramps, etc., along the lakeshore as part of a Tribal economic enterprise. The former Indian lands comprising the present excess lands and the shorelands should be restored to the tribes subject to easements for project purposes.

Item 5. Protection Of Reserved Water Rights.

The tribe's right to water will be protected in a significant and beneficial manner by utilizing water on the irrigation project and municipal, industrial and rural system described in the report. The quantification of other uses should be carried out in cooperation with the tribe.

Item 6. Funding Of All Items From Garrison Diversion Unit Funds.

See Items 1, 2 and 10.

Item 7. Replacement Of Infrastructures Lost By The Creation Of The Garrison Dam and Lake Sakakawea.

The tribes are entitled to the replacement of infrastructure destroyed by Federal action: health care facilities, school dormitories, a bridge for access between the communities and the central facilities, and adequate secondary access roads. The replacement of a primary care in-patient health facility and out-patient services is deemed to be urgent and critical.

Item 8. Preferential Rights To Pick-Sloan Missouri Basin Power.

The Committee received a considerable amount of testimony that Tribal members were led to understand that they were to receive preferential rights to Pick-Sloan Basin power (some witnesses testified no-cost power was promised) to provide for lost fuel sources. That understanding is borne out by the history of the taking legislation. Preferential right to such power should not exceed 10 megawatts.

Item 9. Additional Financial Compensation.

The tribes clearly were not compensated in an amount calculated by a methodology which accounted for the unique circumstances and values taken from the tribe. The Committee received testimony from two economic experts who utilized methodologies designed to account for those unique circumstances and values. Utilizing both formulas for the Fort Berthold Reservation results in compensation due between $178.4 million and $411.8 million. The tribes can be fairly compensated only by determining the value of interests taken by using a formula such as that provided by the economic experts. The compensation, in any event, should not be less than the lower amount determined by the formulas. Per capita payments are not recommended.

Item 10. Other Items Which The Committee Deemed Important.

A complete municipal, industrial and rural water system is essential if the tribes are to realize economic growth. Power requirements for water system fall under item 8 above. Some funds have been authorized in HR1116 of the 99th Congress, but more funding is needed to complete the system. Credit interests need to be transferred from the Farmers Home Administration to the Bureau of Indian Affairs.

B. STANDING ROCK SIOUX INDIAN RESERVATION

Items 1 & 2. Full Potential For Irrigation And Financial Assistance For On-Farm Development Costs.

Development of irrigation on remaining Tribal lands would reduce the Tribes loss of their economic base and good farmlands. Four irrigation projects are recommended for construction initially. This development should be an integral part of the Garrison project and should be included in any Garrison funding authorization legislation. In the event that the Garrison funding is not used, the Tribal projects should still be built. Costs should be deferred by Leavitt Act provisions.

Items 3 & 4. Development Of Shoreline Recreation Potential And Return Of Excess Lands.

The COE took lands up to the elevation of 1632 msl and other lands above this elevation for the operation of Lake Oahe because land ownership is based on a rectangular grid system. Thus, a considerable amount of land above this maximum position level of the reservoir is managed by the COE, The tribes contend that this excess land is not needed by the COE. The COE on the other hand, insists that all the land is required to operate the reservoir and assure public access. The Standing Rock Sioux Tribes would like to develop docks, campgrounds, resorts, picnic areas, boat ramps, etc., along the lakeshore as part of a Tribal economic enterprise. The former Indian lands comprising the present excess lands and the shorelands should be restored to the tribes subject to easements for project purposes.

Item 5. Protection Of Reserved Water Rights.

An initial step to protecting the tribe's right to water results from utilizing water on the irrigation and municipal water supply projects in the report. The quantification of other uses should be carried out in cooperation with the tribe as they may request.

Item 6. Funding Of All Items From Garrison Diversion Unit Funds.

See items 1, 2 and 10.

Item 7. Replacement Of Infrastructures Lost By The Creation Of The Oahe Dam And Lake Oahe.

The Federal action caused a loss of infrastructure including roads, housing, rodeo arenas, race tracks, sawmills, and monuments. The Committee notes the need for weatherized and improved housing to repair and replace the inadequate facilities provided to the families relocated. Remedies for the loss of infrastructure are provided in the section on Additional Financial Compensation.

Item 8. Preferential Rights To Pick-Sloan Missouri Basin Power.

The Committee received a considerable amount of testimony that Tribal members were led to understand that they were to receive preferential rights to Pick-Sloan Basin power (some witnesses testified no-cost power was promised) to provide for lost fuel sources. That understanding is borne out by the history of the taking legislation. Preferential right to such power not to exceed 15 megawatts should be provided.

Item 9. Additional Financial Compensation.

It is clear that the tribes were not compensated in an amount derived from a methodology which accounted for the unique circumstances and values taken from the tribe. The Committee received testimony from two economic experts who utilized methodologies designed to account for those unique circumstances and values. Utilizing both formulas for the Standing Rock Reservation results in compensation due between $181.2 million and $349.9 million. The tribe can be fairly compensated only by determining the value of interests taken by using a formula such as that provided by the economic experts. The compensation, in any event, should not be less than the lower amount determined by the formulas.

Item 10. Other Items Which The Committee Deemed Important.

A complete municipal, industrial and rural water system is essential if the tribes are to realize economic growth. Power requirements for water systems falls under item 8 above. Some funds have been authorized in HR1116 of the 99th Congress, but more funding is needed to complete the system. Credit interest needs to be transferred from the Farmers Home Administration to the Bureau of Indian Affairs. The tribe urges that an "Indian Desk" be established within the organization framework of the Corps of Engineers to deal specifically with Indian problems. Hunting and fishing rights of the Standing Rock Sioux Tribe need better protection and enforcement by Federal authorities.

II. RECOMMENDATIONS

A. FORT BERTHOLD INDIAN RESERVATION

Item 1. Full Potential For Irrigation.

Although 107,000 acres have been identified as potentially irrigable, the Secretary should proceed immediately with the construction of the two irrigation projects, Six Mile Creek and Lucky Mound. These projects should be regarded as the first phase in the full development of the irrigation potential of the remaining lands of the Fort Berthold Reservation. The Secretary should also submit proposed legislation to Congress that would allow all capital costs, including on-farm development costs to be deferred under the Leavitt Act. This proposed legislation should further provide for: the enlargement of the above refereuced irrigation projects to 30,000 acres, as recommended by this Commission; land acquisition costs associated with the purchasing of all fee patented land in these areas to be treated as project costs; the BIA or Bureau of Reclamation to operate, maintain and replace the structural components of the project at a cost to the Tribal government, or its members, based on ability to pay; and intake and sprinkler pressure pumping power at preferential Pick-Sloan power rates for both for these projects.

Any fee land acquired for Tribal irrigation projects must be from willing sellers at fair market value. Land should be acquired under the rules established by the Department of Interior to ensure the protection of the tax base, school system, etc. The Secretary will be responsible for agreements for payments in lieu of taxes, where appropriate.

Item 2. Financial Assistance For On-Farm Development Costs.

On-farm development costs should be included in the capital cost of development and deferred under the Leavitt Act.

Item 3. Development Of Shoreline Recreation Potential.

Former Indian shoreline land and excess land should be returned to the Tribes, subject to flowage easements to protect U.S. Army Corps of Engineers (COE) administration and project needs and also subject to valid private leases. Such private leases should not be renewed but upon expiration, will include salvage rights and fair compensation for the loss of permanent improvements not subject to removal.

Item 4. Return Of Excess Lands.

See Recommendation 3.

Item 5. Protection Of Reserved Water Rights.

The Committee recommends the full development of irrigation and water systems to utilize and protect reserved water rights.

Item 6. Funding Of Items From Garrison Diversion Unit Funds.

Partial funding of the irrigation project (15,000 acres) in item 1 and partial funding of the municipal, industrial and rural water system in item 10 should be amendments to the authorization in HR1116 of the 99th Congress ($20.5 million has been authorized in HR1116 for Rural Water Systems).

Item 7. Replacement Of Infrastructure Lost By The Creation Of Garrison Dam And Lake Sakakawea.

The following facilities should be constructed to replace infrastructure lost:

a. A primary care in-patient health facility and out-patient services to meet the special health care needs of the tribe. This is an emergency need that should be pursued immediately.

b. A bridge over the lake at the old Highway State Route 8 should be constructed.

c. Dormitory annexes to two school facilities (Mandaree and White Shield) on the reservation for students presently attending off-reservation boarding schools should be constructed.

d. The grading, and other such routine maintenance, of all Tribal access roads from homesites to main travel routes should be made a routine part of the BIA program.

e. Housing should be weatherized and improved to repair and to replace the inadequate facilities provided to the families relocated.

Item 8. Preference Rights To Pick-Sloan Missouri River Basin Power.

The Secretary, in consultation with the Secretary of Energy, should make available to the tribe an allocation of preference power sufficient to meet energy related needs of the reservation as the result of the relocation. Further, the Secretary, if necessary, should propose draft legislation to Congress providing for an allocation of preference power to meet the Tribes full load demand for the above referenced purposes not to exceed 10 megawatts. This proposed legislation should also provide the necessary authority for the delivery of such power at no cost to the tribe except operation and maintenance costs to retail distribution facilities should be based on ability to pay. This legislation should also provide that any third party provider of such power to the tribe will not lose any allocation of preference power or otherwise be pecuniarily damaged by reason of any such allocation or delivery of preference power to the tribe. Power needs for irrigation and water systems are in addition to the 10 megawatts.

Item 9. Right To Additional Financial Compensation.

The Secretary should submit draft legislation to Congress that will ensure that the tribe is adequately compensated, either in cash or in-kind, consistent with this Committee's findings and conclusions. The tribe is entitled to a sum in the range between $178.4 million and $411.8 million as the substitute, or replacement, value of their economic base that was taken as the site for Lake Sakakawea. The compensation should not be less than the lower of the two amounts.

Item 10. Other Items Which The Committee Deemed Important.

a. In addition to the authorization contained in House Resolution 1116 of the 99th Congress, the Secretary should seek authorization and proceed immediately with the construction of a complete municipal, industrial and rural water supply system, as described in this report, to protect the health and other interest of the Tribal population. The proposed legislation should also provide that the Bureau of Indian Affairs or the Bureau of Reclamation operate and maintain an efficient metered system at a cost to Tribal people not to exceed $10/month/household for 10,500 gallons per month. Uses in excess of 10,500 gallons per month will additionally be charged at the same rate. Further, power is to be supplied at the Pick-Sloan Missouri River Basin Program preference power rate. (Note: There is $20.5 million authorized in HR 1116 for rural water systems).

b. The Secretary is requested to take action that would provide for the transfer of the interests of agricultural and ranch related lenders on the reservation from the Farmers Home Administration to the Bureau of Indian Affairs Credit Program at fair market value of the interest in the land encumbered.

B. STANDING ROCK SIOUX INDIAN RESERVATION

Item 1. Full Potential For Irrigation.

The Secretary should proceed immediately with the construction of four irrigation projects, Miscol, Porcupine, Black Horse and Little Eagle Units, when authorized. These projects should be regarded as the first phase of the full development of the irrigation potential of remaining lands on the Standing Rock Reservation. The Secretary should also submit proposed legislation to Congress that would allow all capital costs, including on-farm development costs to be deferred under the Leavitt Act. This proposed legislation should further provide for: land acquisition costs associated with the purchasing of all fee patented land in these areas to be treated as project costs; BIA to operate, maintain and replace the project at a cost to the Tribal government, or its members, after construction to be set in accordance with ability to pay; and furnishing preferential Pick-Sloan power rates for both intake and sprinkler pressure pumping for this projects. (Note: under P.L. 97-273, the Standing Rock Sioux Tribe believe they have preferential power rights).

Item 2. Financial Assistance For On-Farm Development Costs.

On-farm development costs should be included in the capital cost of development and deferred under the Leavitt Act.

Item 3. Development Of Shoreline Recreation Potential.

Former Indian shoreline land and excess land should be returned to the tribe, subject to flowage easements to protect U.S. Army Corps of Engineers administration and project needs and subject to valid private leases.

Item 4. Return Of Excess Lands.

See Recommendation 3. In addition, the Standing Rock Sioux Tribe should have the authority to set grazing rates on former Indian lands for taking area permittees equivalent to rates established for Tribal lands until both excess and shoreline lands have been returned.

Item 5. Protection Of Reserved Water Rights.

The Committee recommends full development of irrigation and water system to utilize and protect reserved water rights.

Item 6. Funding Of All Items From The Garrison Diversion Unit Funds.

The Secretary should fund those projects in item 1 and 10 from the Garrison authorization bill (HR 1116) that the Secretary deems appropriate.

Item 7. Replacement Of Infrastructure Lost By The Creation Of Oahe Dam And Lake Oahe.

The following infrastructure was lost to the Standing Rock Sioux Tribe as a result of the creation of Lake Oahe:

190	domestic water system
50	ranch water system
55,944	acres of land
22,000	acres of riverbed
95	miles of main road
24	miles of private road
190	housing units
3	rodeo arenas
2	race tracks
3	sawmills

These items are covered either directly or indirectly in item 9, Additional compensation. The Committee is recommending a reservation-wide economic development approach, rather than ad hoc compensation of the above.

Item 8. Preferential Right To Pick-Sloan Missouri River Basin Power.

The Secretary, in consultation with the Secretary of Energy, should make available to the tribe an allocation of preference power sufficient to meet their full load demand for domestic and municipal purposes. Further, the Secretary, if necessary, should propose draft legislation to Congress providing for an allocation of preference power to meet the Tribe's full load demand for the aboved referenced purposes not to exceed 15 megawatts. This proposed legislation should also provide the necessary authority for the delivery of such power at no cost to the tribe except operation and maintenance costs of retail distribution facilities should be based on ability to pay. This legislation should also provide that any third party provider of such power to the tribe will not lose any allocation of preference power or otherwise for pecuniarily damaged, by reason of any such allocation or delivery of preference power to the tribe.

Item 9. Right To Additional Financial Compensation.

The Secretary should submit draft legislation to Congress that will ensure that the tribe is adequately compensated, either in cash or in-kind, consistent with this Committee's findings and conclusions. The tribe is entitled to a sum in the range between $181.2 million and $349.9 million. As the substitute, or replacement, value of their economic base that was taken as the site for Lake Oahe. The compensation should not be less than the lower of the two amounts. That such compensation is to include restoration of forests and timber production, wildlife habitat, fruits, herbs and medicinal, and other plants and other restoration of vegetation, all of which was lost to the Oahe Reservoir. That such compensation is also to include development of shoreline recreation protection.

Item 10. Other Items Which The Committee Deemed Important.

a. In addition to the authorization contained in House Resolution 1116, the Secretary should seek authorization and proceed immediately with the construction of a complete municipal, industrial and rural water supply system, as described in this report, to protect the health and other interest of the Tribal population. The proposed legislation should also provide that the Bureau of Indian Affairs operate and maintain an efficient metered system at a cost to Tribal people not to exceed $10/month/household for 10,500 gallons per month. Further, power is to be supplied at the Pick-Sloan Missouri River Basin Program preference power rate. (Note: There is $20.5 million authorized in HR 1116 for rural water systems).

b. The Secretary is requested to take action that would provide for the transfer of the interests of agricultural and ranch related lenders on the reservation from the Farmers Home Administration to the Bureau of Indian Affairs Credit Program at fair market value of the interest in the land encumbered.

c. An "Indian desk" should be established within the Washington Headquarters of the U.S. Army Corps of Engineers. This office would deal with the numerous Indian concerns resulting from the Missouri River Reservoirs including, but not limited to, water level fluctuation; leasing shoreline land to non-Indians of, and other former Indian lands administered by the Corps, to non-Indians; reserved water rights, etc.

d. The rights of the Standing Rock Sioux Tribes to hunt and fish within that part of Lake Oahe within the exterior boundaries of the reservation should be vigorously protected by Federal authorities through additional game wardens who shall pursue prosecution of violations.

PREPARED STATEMENT OF HON. BILL BRADLEY, U.S. SENATOR FROM NEW JERSEY, AND CHAIRMAN, SUBCOMMITTEE ON WATER AND POWER

Passage of last Congress' Garrison Diversion Reformulation Act of 1986 focused public attention on the need to address contemporary water needs in North Dakota and the appropriate Federal role. The Act authorizes and directs the implementation of certain recommendations made by the Garrison Diversion Unit Commission. The Garrison Diversion Unit Reformulation Act of 1986 was the culmination of years of effort between the State of North Dakota, environmentalists, would-be water users, and the Congress. The Act forcibly wrought changes in decades-old planning and thinking in order to bring a modern vision to water resources development in North Dakota.

It was not an easy task -- and the effort is far from complete.

That is why we are here today.

As all of you know, the Garrison Unit Joint Tribal Advisory Committee was established by the Secretary of the Interior pursuant to a recommendation of the Garrison Diversion Unit Commission. The Advisory Committee was specifically charged with examining and making recommendations with regard to the Tribes of the Fort Berthold and Standing Rock Sioux Reservations.

As submitted to the Secretary of the Interior on May 23, 1986, the Advisory Committee's report provides a comprehensive framework upon which to redress the wrongs of a past generation. In restrospect, it is incredible to me that the needs of the people of the Standing Rock and Fort Berthold Reservations were not given greater attention by the Congress when the Missouri River main stem dams were built. This hearing is an important first step in giving due recognition to the burdens inflicted on the Tribes by the Pick-Sloan Program. This recognition is long overdue. Just as we brought the Garrison Diversion Project into the context of contemporary resource development, thereby fulfilling the promise of a past generation, so must we recognize our obligations to the people of the Standing Rock and Fort Berthold Reservations.

Many of the recommendations contained in the Committee's report are preliminary at best. It is up to the Congress, working with the Tribes, the State of North Dakota, and the Administration, to determine those options and actions which will best serve the needs of the Tribes while meeting our National obligation.

As Chairman of the Subcommittee on Water and Power, I can assure you that the recommendations of the Committee and your comments here today will receive most careful consideration. It is essential that any water resource development undertaken on the Reservations not be viewed solely as compensation for past omissions, but rather as a lasting investment in a resource and a people.

PREPARED STATEMENT OF HON GEORGE MILLER, MEMBER OF CONGRESS FROM CALIFORNIA, AND CHAIRMAN, SUBCOMMITTEE ON WATER AND POWER RESOURCES COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

Mr. Chairman, I appreciate the hospitality you and Senator Johnston have shown in inviting the Subcommittee on Water and Power Resources to participate in today's joint hearings on the recommendations of the Garrison Unit Joint Tribal Advisory Committee.

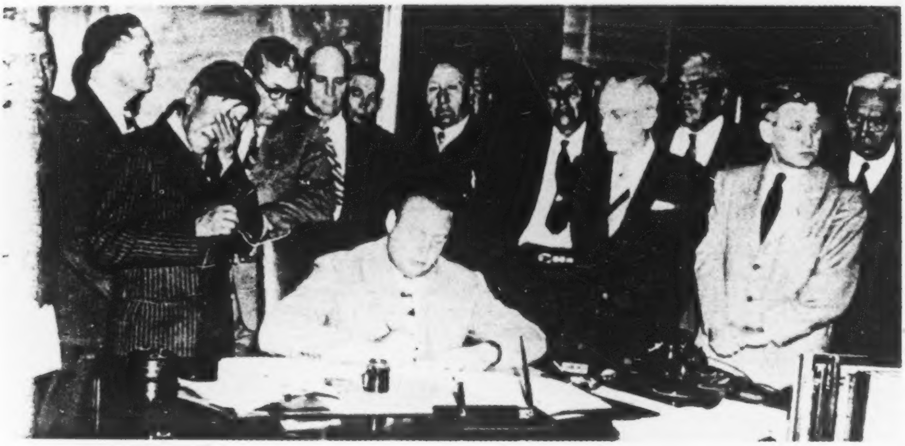
Mr. Chairman, I ask unanimous consent that a copy of a photograph taken on May 20, 1948 be included in the record of today's hearing. The photograh, which is found in Marc Reisner's book Cadillac Desert, tells a poignant story about the manner in which our government has treated Indian tribes. The caption for this picture in Reisner's book reads as follows:

> George Gillette, chairman of the Fort Berthold Indian Tribe Business Council, weeps as he watches Secretary of the Interior J.A. Krug sign a contract whereby the tribe sells 155,000 acres of its reservation's best land in North Dakota to the government for the Garrison Dam and Reservoir Project on May 20, 1948. Gillette said of the sale: "The members of the Tribal Council sign the contract with heavy hearts . . . Right now, the future does not look good to us."

Mr. Chairman, the bleak predictions of Chairman Gillette in 1948 have all too sadly come true. The Three Affiliated Tribes of Fort Berthold have never recovered from the economic and social destruction of their reservation caused by the construction of Garrison Dam. Similarly, the Standing Rock tribe was wronged and cheated for the construction of the Oahe Dam and Reservoir.

The report of the Garrison Unit Joint Tribal Adsvisory Committee clearly documents the failure of our government to adequately compensate these tribes. I compliment the Members of the Committee for their hard work and sound judgement. I also would like to express my appreciation to Ann Zorn and Norman Livermore, who devoted extra time and attention to this matter during their service on the Garrison Diversion Unit Commission in 1984.

Mr. Chairman, I look forward to this opportunity to hear from the tribes and our other witnesses this afternoon.



George Gillette, chairman of the Fort Berthold Indian Tribe Business Council, weeps as he watches Secretary of the Interior J. A. Krug sign a contract whereby the tribe sells 155,000 acres of its reservation's best land in North Dakota to the government for the Garrison Dam and Reservoir Project on May 20, 1948. Gillette said of the sale: "The members of the Tribal Council sign the contract with heavy hearts. . . . Right now, the future does not look good to us." *(AP–Wide World Photos)*

For more than fifty years, the tiny man-made river in the foreground, the Granite Reef Aqueduct of the Central Arizona Project, has been viewed by Arizonans as the one thing that can save them from oblivion. In the next century, however, as seven states suck up their full share of the feckless and overappropriated Colorado River, the aqueduct may run as empty as the diversion canal on the right. *(Bureau of Reclamation)*

PREPARED STATEMENT OF ANN A. ZORN

I am Ann A. Zorn. I reside in Las Vegas, Nevada. In the fall of 1984 I was privileged to serve as a member of the Secretary's Garrison Diversion Unit Commission. I very much appreciate the opportunity to come before you today.

The Garrison Commission Report recognized that earlier federal moral and legal committments to North Dakota and the Indian tribes affected by the Garrison and Oahe dams had not been met. Mr. Norman Livermore and I were the commissioners most instrumental in calling for the creation of the Joint Tribal Advisory Committee to examine the Indian issues in greater detail than we were able to do. I support the conclusions and recommendations of the JTAC report of May, 1986, and I would like to tell you why I felt so strongly that JTAC should be created.

The testimony and background information gathered by the Garrison Commission made it clear that there was a federal obligation to North Dakota for the sacrifice of the Missouri River bottom lands. It was also clear that the Indian citizens of North Dakota shouldered a substantial portion of that sacrifice. All of the bottom lands (more than 150,000 acres) belonging to the Three Affiliated Tribes were inundated by the waters behind the Garrison dam and these acres constituted more than one third of all the land under Lake Sakakawea.

The bottom lands in the "Taking Area" were not just land owned by the tribes - they were the economic and social base of the tribes. The uplands offered as "in lieu" lands could not be counted as equivalent to the bottom lands for they could not support the same type of ranching and agricultural economy which the bottom lands provided. 90% of the families of the Ft. Berthold reservation lived along the river and had to be relocated. Maps show a concentration of homes in the bottom land area before the dam was built, but there is a widely dispersed pattern of residence after the people were moved to the uplands.

Unfortunately, there does not seem to be any "in lieu" solution for the social trauma these families and the tribes experienced when relocation scattered a previously concentrated and cohesive settlement, when schools, hospital, and health services disappeared or diminished, when distances between families and friends were magnified by the loss of bridges and roads. A reasonably self sufficient community of people was turned topsy-turvy and left to right itself without the promised assistance or means of establishing a new economic base forthcoming. Small wonder the pre-Garrison dam unemployment rate was only 5% to 6% but today has risen to 70% to 80%.

Mr. Livermore and I took the opportunity to visit the reservations in December of 1984. I spent the daylight hours of December 12th seeing some of the Ft. Berthold reservation by car and much of it from the air. I met with tribal elders, talked with people who are running the day to day programs at tribal headquarters, and listened to the experiences of those who had lived the story. When we left Minot for the long drive to the reservation I knew from the crunch of the ground underfoot that the temperature was close to zero. The snow covered landscape reminded me a little of Wisconsin or New Hampshire. But I also learned of folks who had to choose between telephones and heat during the long winters. More often than not they opted for the heat and had to forego the safety net of the communication line . Viewing the reservation from the air, my guides pointed out the old townsites and bridge locations that were now inundated. And I saw how the land areas were divided by the lake waters. "You can't get there from here" is the only way to describe the impact on the critical transportation system. I wondered briefly why the tribes did not utilize the recreational potential of the long shoreline spread out below us - until I learned that the tribes had not options there, but others did.

In searching my mind for a personal experience which I could relate to impact of the Garrison dam - some comparable occurance that would help me understand - the closest I could come was to remember the destructive nature of ill planned freeways which divided and conquered close knit ethnic neighborhoods in the New England area where we lived in the late 1950's and early 1960's.

I am including with my statement the short notes from which Mr. Livermore and I reported back to our fellow commissioners. I am pleased that there was unanimous approval of the indian issues recommendations included in the final report.

Again, I endorse the JTAC findings and recommendations. I ask that you adopt them and trust that implementation will not be too far in the future.

OBSERVATIONS ON VISITS TO INDIAN RESERVATIONS*

~~Agricultural~~ with inundation –

- ECONOMIC BASE IS GONE

Three Affiliated Tribes of Ft. Berthold

- * 8 towns flooded out
- * prime agricultural lands lost
- * bridge destroyed, hospital lost, transportation network decimated
- * land reduced to 423,000 acres (out of original 12.5 million; much of this was lost before 1900, but large amounts of valuable farmland was given over to homesteaders in 1910; Garrison inundated small amount of remaining bottomland)
- * infrastructure inadequately replaced
- * New Town stores owned and operated by non-indians
- * shoreline access denied to Indians; but given to non-Indians (for second homes)
- * authority to develop recreation potential of shoreline denied to Indians; but boat ramp sold to "a group of doctors"
- * unemployment before dam: 5-6%
- * unemployment today: 70 - 80%
- * alternate dam site had been offered by Indians

Frustrated ~~[illegible]~~ [illegible] of [illegible] economic base. Small ~~[illegible]~~ sized land holdings.

. moved from [illegible] cash economy

Standing Rock Sioux

- * no help for Corps of Engineers in relocating (on short notice during severe winter)
- * pitiful relocation of towns
- * construction of substandard homes (small, one-room houses)
- * inadequate development of recreation sites (with excellent recreation sites just outside reservation to the south)
- * shoreline often consists of mudflats (which create dustbowls during dry weather)
- * excess lands never returned
- * drawdown of Lake Oahe (from combined irrigation from Garrison and Oahe) would increase mudflats, cause drinking water problems, could affect irrigation
- * Winter's Right Doctrine assures water to Standing Rock Sioux and all other downstream tribes (Standing Rock is one of twenty-six Sioux Nations)
- * Urge recommendation of Congressional oversight hearings on Indian water rights in Missouri River Basin

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* Notes from trip to Ft. Berthold by Ann Zorn and Standing Rock and Ft. Berthold by Ike Livermore; 12-12-84

PREPARED STATEMENT OF NORMAN B. LIVERMORE, JR.

Thank you for your letter of March 25 inviting me to present testimony at your oversight hearing which is being held to consider the recommendation of the Garrison Unit Joint Tribal Advisory Committee. I regret very much that a temporary indisposition prevents my appearing before you personally.

My interest in and concern for justice to Indians dates back many years, but was particularly activated by evidence presented by Indian Tribes at the Garrison hearings which were held in Washington and North Dakota in the latter months of 1984.

During the course of these hearings, it became clearly evident to me that the Indian Tribes most acutely involved, namely, the Tribes at the Fort Berthold and Standing Rock Reservations, were given grossly inadequate consideration in the then-proposed Garrison Unit legislation. Another Commission member, Anne Zorne, joined with me in evincing particular concern as to the Indians' plight. As a result, she and I took extra time to visit the Reservations; she to Fort Berthold and I to both Standing Rock and Fort Berthold.

The conditions observed at one or both of these Reservations were enough to cause tears. Some of them were:

- woefully inadequate housing;
- a tragically shattered road system;
- inadequate access to the shorelines of Lakes Oahe and Sakakawea;
- villages destroyed by inundation;

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*Statement by Norman B. Livermore, Jr., former member of the Garrison Diversion Unit Commission (1984); California State Secretary for Resources (1967-1974); Transition Team Leader, Environmental Protection Agency (1980) before the Joint Oversight Hearing of the Senate Committee on Energy and Natural Resources, the Senate Select Committee on Indian Affairs, and the House Committee on Interior and Insular Affairs, March 31, 1987

- a major highway bridge rendered useless; and,
- countless infrastructures destroyed.

In addition to these sad evidences of physical deterioration, we were made keenly aware of social tragedies and United States Government promises not kept:

- inadequate hospital and school facilities;
- inexcusable lack of notice of the effects of water impoundment;
- destruction of social structures;
- lack of respect for the burial place of the famous Chief Sitting Bull;
- promises unkept as to water and power rights; and,
- grossly inadequate payment for Indian lands condemned for the inundation area caused by the dams.

Overall, it appears to me that there have been two overriding inadequacies involved in the settlement that was proposed for the two reservations by the original Garrison legislation:

1. Compensation proposed for the Tribes was entirely inadequate when measured against the economic and social losses they have suffered.

2. In urging the original Garrison legislation, North Dakota leaders seem to express little, if any, concern for Indians' problems. Of all the massive evidence the 1984 Commission was presented with, urging the U.S. Government to "pay back the debt owing to the State of North Dakota," I can recall no evidence (other than that of Indians themselves) that specifically mention the Tribes' plight. In fact, I recall at one session when I posed the question, "You say a debt is due to the people of North Dakota; are not Indians part of the people?" The answer I got was: "Oh, we are not concerned about them. They are handled from Washington."

Mr. Chairman, I have read with approval the May 23, 1986, Final Report of the Garrison Unit Joint Tribal Advisory Committee, and I hope and trust that you and the Committees meeting here today will recommend its adoption in full.

I have noted Congressman Dorgan's February 28, 1985, statement at the Subcommittee Hearings on the Garrison Diversion Unit Commission's Recommendations, when he said: "I am pleased to see an underscoring of the fact that we do have a serious commitment to the Indian Tribes, and we can't keep putting it under the carpet and walking away from it."

Mr. Chairman, I would like to emphasize these same sentiments and strongly urge you to act on them.

PREPARED STATEMENT OF C. EMERSON MURRY

My name is C. Emerson Murry. At the request of the Secretary of the Interior, I served as Chairman of the Garrison Unit Joint Tribal Advisory Committee established to examine and make recommendations with respect to the effects of the impoundment of waters under the Pick-Sloan Missouri Basin Program (Oahe and Garrison Reservoirs) on the Fort Berthold and Standing Rock Indian Reservations. The Secretary's action implemented a recommendation in the final report of the Garrison Diversion Unit Commission established pursuant to public law 98-360, §207 of the 99th Congress. The charter and responsibilities of the Committee are included in the letter of transmittal in the Joint Tribal Advisory Committee Report.

The Committee spent many hours and days in public hearings in the State of North Dakota, on both reservations, and at central points within the State. All testimony was recorded. The staff of the Committee made an extensive search of both Congressional and Agency documents and communications, as well as of studies carried on prior to, during, and after the construction of the Oahe and Garrison dams. These hearings, searches, and studies resulted in the Committee concluding that the GDU Commission was entirely correct when it stated "Implementation of the Flood Control Act of 1944 had a significant impact on Indian tribes in North Dakota. The Commission received evidence that the Federal Government has not provided promised assistance to replace the economic base of the State and tribes."

You will note that the general direction of the recommendations is to simply replace what was destroyed by the creation of the two dams so that the tribes may obtain economic independence. No recommendation calls for a lump sum payment or per capita payments to the tribes.

There is no question that the construction of the two dams and the subsequent impoundment of waters destroyed the major economic base of both the Standing Rock and the Fort Berthold reservations. The remaining lands of the reservations simply could not support the ranching, farming, and gardening economies that were so important. In the case of the Fort Berthold reservation, these activities made it one of the few, and perhaps the only, economically self-sufficient reservation in the country. The lack of timber, water, and shelter in the upland areas to which tribal members were relocated further affected the economic loss, as well as having a major impact on the traditional way of life and the quality of life for all members. In the case of the

Fort Berthold reservation, the physical isolation of segments of the reservation caused by the rising waters of the impoundment severed family, tribal, and institutional support ties and facilities. The subsequent emotional impact of this abrupt and radical change cannot truly be quantified, but it was major, and its effect lasts until this day.

The Indians intensely feel that they were not compensated for the taking of their lands and the destruction of related benefits by the United States. Transfer of title to Indian lands to the United States was never really voluntary, since the Indians felt intimidated by the fact that construction of the dams had begun even before Indian lands were acquired. They recognized that the taking of their lands was inevitable. Assurances given both expressly and by implication by various federal officials that problems anticipated by the Indians would be remedied, raised expectations which, in many cases, were never fulfilled.

In some instances, not only was the existing economic base destroyed, but the potential for future expansion of this economic base was destroyed. For instance, when the fertile alluvial bottom lands of the Fort Berthold reservation were flooded by Lake Sakakawea, the tribes lost over 40,000 acres of potentially irrigable land. The costs of developing these irrigable lands was only a fraction of the costs required for developing remaining tribal lands that are believed to be irrigable. The difficulties of transportation between the divided segments of the Fort Berthold reservation because of lack of bridges further erodes the possibility of the extraction of natural resources such as lignite coal, and the establishment of processing or manufacturing industries.

The Committee found that the tribes are entitled to be made whole for their specific losses resulting from the two major impoundments, and for their loss of economic potential. Among the major recommendations of the Committee are that of the development of irrigation to support the farm and ranch economies; the return of excess lands currently held by the Corps of Engineers beyond that required for reservoir operation in order to develop a recreational potential on the reservation; replacement of infrastructure destroyed by federal action such as health care facilities, school dormitories, a bridge upon the Fort Berthold reservation to provide access between communities and central facilities, adequate secondary access roads, the replacement of primary care inpatient health facilities and outpatient services; access to a reasonable amount of Pick-Sloan Basin power on a preferential-right basis; a development of a municipal industrial rural and water systems; upgrading of replacement housing in both numbers and quality to provide the necessary level of comfort and as required by health needs; and the establishment of a compensation program to the tribes consistent with the value of the economic base that was taken from them for the impoundments.

In regard to the compensation program for the loss of economic base, two methods of calculation were presented to and recognized by the Committee as rational methods of calculating such compensation. The Committee recommended that such general compensation program be no less than the smaller compensation amount resulting from the application of the two methods.

I will not attempt to further detail the findings and recommendations of the Committee, as I believe them to be adequately explained within the Committee Report. It is my understanding that representatives of the two tribes will present specific programs and priorities which are consistent with the findings and recommendations of the Committee in meeting the justified entitlements of the tribes and the Indian citizens affected.

It is noted that, based upon the initial report of the Garrison Diversion Unit Commission, that the Garrison Diversion Unit Reformulation Act of 1946 included an authorization of $67,910,000 for the development of 17,580 acres of irrigation upon the two reservations, and the sum of $20,500,000 for municipal, rural, and industrial water systems as a partial recognition of tribal and Indian entitlement resulting from the two dams.

It is recognized that the costs in meeting these tribal entitlements is not small. I would note, however, that with the over $3 billion of flood control benefits to lower Missouri Basin states have resulted from the mainstream dams, coupled with increases in navigation benefits of over 3 million tons per year, and the advantages to them of major blocks of low cost preference power, that the cost of attempting to make the two tribes whole in a material way is, in fact, moderate.

I know I speak on behalf of all members of the Joint Tribal Advisory Committee when I urge the most serious consideration of the tribal needs and entitlements contained in the Report, and in the recommendations of the Committee.

PREPARED STATEMENT OF ROSS O. SWIMMER

Mr. Chairman and members of the Committees, I am pleased to present the views of the Department of the Interior on the recommendations of the Garrison Diversion Unit Joint Tribal Advisory Committee.

The Committee's report provides a wide variety of proposals for mitigating what the Indians of the Fort Berthold and Standing Rock Indian Reservations strongly believe are inequities borne by them due to the construction of the Oahe and Garrison Reservoirs of the Pick-Sloan Program. In our view, because Congress has taken steps to address some of these issues through the enactment of P.L. 99-294, actions to implement the Committee's recommendations should be taken largely in the context of the reformation of the Garrison Diversion Unit.

The Committee's report addresses ten items and provides recommendations for each Indian Tribe on each item. This statement addresses each of those items. Except where otherwise indicated. the Department has no position at this time on recommendations requiring legislation.

Item 1. Full potential for irrigation on the Reservations.

P.L. 99-294 authorizes the Secretary of the Interior to develop irrigation facilities for 17,580 acres of land in the Fort Berthold and Standing Rock Indian Reservations pending a determination by the Secretary of the suitability of the land for irrigation, and authorizes the appropriation of $67,910,000 for this purpose. The Committee's report recommends legislation that would provide for irrigation development beyond the 17,580 acres authorized by P.L. 99-294. The recommendation identifies 113,000 acres for development and would provide for funding capital costs, deferral of their repayment, and establishing preferential Pick-Sloan power rates for the irrigation development. We have not conducted studies to determine the irrigability of the additional lands in question, or whether the proposed development would be economically justified. In some instances, there are alternatives to irrigation development that yield a tribe a better return on its water resources.

It should be noted that the Committee based its recommendation on a finding that the lands identified some fifty years ago in the taking as having been suitable for irrigation were greatly understated when viewed in the context of technological improvements in irrigation since that time.

In any event, additional irrigation development beyond the 17,580 acres authorized by P.L. 99-294 would require further authorization by Congress. We also note that in light of budget constraints, the current Department budget request for FY 1988 does not provide for significant development of the Indian or non-Indian components of the Garrison Diversion Project. Finally, we point out that since the Tribes' reserved water rights have yet to be quantified, the Committee's recommendations for development of the irrigation potential do not necessarily reflect the Tribes' full water entitlement. (This is addressed further in our comments on item 5.)

Item 2. Financial assistance for on-farm development costs. The Committee's report recommends that all on-farm costs associated with the irrigation projects be included as capital costs and deferred under the Leavitt Act (25 U.S.C. 386a). If it is decided to implement this recommendation, P.L. 99-294 would have to be amended, or other authorizing legislation enacted, to the extent that deferral of the on-farm development costs associated with the Committee's recommendations is not already authorized.

Items 3. and 4. Development of shoreline recreation potential of Lake Sakakawea and Lake Oahe; and Return of excess lands. We would be interested in working with Congress to vest the tribes with an interest and corresponding management authority in those lands in their respective reservations which the Corps of Engineers does not need for project purposes. However, we have been informed by the Corps that it (the Corps) currently has no lands excess to project needs. Your Committees may wish to pursue this matter directly with the Corps.

In a related matter, whether the Standing Rock Sioux Tribe may lease its grazing rights to other parties seems to depend on whether that action is allowable under P L. 85-915 which provides that the Tribe "shall be given exclusive permission, without cost, to graze stock on the land between the water level of the reservoir and the exterior boundary of the taking area." The Comptroller General has interpreted acts with identical language (concerning grazing rights of other tribes) to preclude the leasing of the tribal grazing right on the basis that "exclusive permission" to graze stock is, in effect, a license and not a right. According to the Comptroller General, such a license conveys no interest in land but is a personal privilege which can only be enjoyed by the licensee. (Op. Comp. Gen. B-142250, July 25, 1960.) Since P.L. 85-915 apparently does not authorize the Tribe to lease its grazing rights, additional legislation would be needed. We believe that the tribe should be allowed to lease its grazing rights, subject to project purposes and relieve the United States from any liability arising therefrom.

Item 5. Protection of reserved water rights. The reserved water rights of the Tribes are not currently quantified. It is possible for quantification to be achieved through negotiation or litigation. We are not aware of any efforts underway either by the State or the Tribes to quantify the reserved water rights of the Tribes.

Item 6. Funding of all items from the Garrison Diversion Unit funds. Many of the items in the Committee's report are not the subject of P.L. 99-294. Therefore, P.L. 99-294 would need to be amended, or other authorizing legislation enacted, to the extent that the appropriations authorized are inadequate to cover the Committee's recommendations for the full development of irrigation potential on the reservations, as well as the development of municipal, industrial and rural water systems.

Item 7. Replacement of infrastructures lost by the creation of Garrison Dam and Lake Sakakawea and Oahe dam and Lake Oahe. The Committee recommends replacement of lost infrastructures including those relating to health, education, housing, and roads. We believe the need for the infrastructures so identified should be evaluated by the appropriate Federal agencies and included in the annual program and budget plans for each agency, if appropriate.

With reference to the specific request that the Bureau of Indian Affairs provide dormitories on the Fort Berthold Reservation, our figures for the current academic year show that only 57 students, rather than 97 cited in the report, are attending boarding schools. As there are reasons other than distance from existing day schools why students may be in a boarding situation, the number of students who would actually be housed in a dormitory on the reservation may be fewer. The Bureau would not recommend dormitory construction in two or more locations for so few students. While the initial construction cost is not high, there would be on-going requirements for additional staffing, counseling, programmatic and operations maintenance support which are not reflected in the report.

The report requests replacement or improvement of housing as the existing homes are not sufficiently insulated. We would note that the homes were built during a time when insulation standards were considerably below current practices. There are substantial funds available for weatherization of existing homes through the Department of Energy and through the oil overcharge settlements and the tribes can apply for these funds.

Item 8. Preferential rights to Pick-Sloan Missouri River Basin Power. The Committee's report recommends that both the Fort Berthold and the Standing Rock Reservations be assured of a firm supply of Pick-Sloan Basin Program power for purposes of municipal, rural, and industrial water system (M&I) and irrigation (both first lift pumping power and power for sprinkler pressurization).

Under P.L. 99-294, the Fort Berthold and Standing Rock Reservations are entitled to firm supplies of power for M&I. The Tribes would pay the Western Area Power Administration the wholesale firm power service rate which is currently about 7.4 mils per kwh, for M&I power. As to irrigation, under P.L. 99-294, certain lands on the Standing Rock Sioux and Fort Berthold Reservations are authorized for development as irrigation areas of the Garrison Diversion Project, Pick-Sloan Missouri Basin Program, and therefore are entitled to a firm supply of irrigation power. However, it is the policy of the Bureau of Reclamation that power for authorized irrigation projects of the Pick-Sloan Missouri Basin Program will be provided only for first-lift pumping uses, not for sprinkler pressurization, unless otherwise specifically provided for by legislation. (The rate paid by irrigators for first-lift pumping power is the Bureau of Reclamation project use rate.)

Under the WEB Act (P.L. 97-273), the Secretary of the Interior, in cooperation with the Secretary of Energy, was authorized to make Pick-Sloan power available to five Indian tribes, including the Standing Rock Sioux Tribe. Pursuant to the WEB Act, the Departments of the Interior and Energy are providing Pick-Sloan power to the irrigation projects constructed for the tribes named in the WEB Act (including Standing Rock) for both first lift pumping and sprinkler pressurization uses. Those tribes pay the project use rate for first lift pumping power and the firm power service rate for sprinkler pressurization power. Pick-Sloan power for sprinkler pressurization for the additional irrigation facilities on the Standing Rock Reservation which are authorized to be developed under P.L. 99-294 may be made available to the Standing Rock Tribe under the WEB Act.

The Fort Berthold Reservation, however, is not named in the WEB Act, nor does any other legislation appear to provide it with a firm supply of Pick-Sloan power for sprinkler pressurization use. Thus, Fort Berthold appears to be entitled only to a firm supply of Pick-Sloan power for first lift pumping use. The Three Affiliated Tribes of Fort Berthold could seek power for sprinkler pressurization, at the firm power service rate, from the Department of Energy through the regular contractual process; however, we understand that no contracted power will be available until the year 2001. Thus, if the decision is made to assure Fort Berthold of power for sprinkler pressurization use, in our view, additional legislation would be needed.

Item 9. Additional financial compensation. In our view, the Committee's report does not provide adequate documentation to establish that the Tribes are entitled to additional financial compensation in the form of the substitute or replacement value of the economic bases lost as a result of the siting of Lake Sakakawea or Lake Oahe.

Item 10. Other items the Committee deems appropriate. Four subjects were included in this item:

A. The appropriation ceilings authorized in P.L. 99-294 are inadequate to construct the municipal, industrial, and rural water supply systems contemplated in the Committee's recommendations.

B. While the Department could take administrative action to seek a transfer of the interests of agricultural and ranch-related lenders on the reservations from the Farmers Home Administration (FmHA) to the Bureau of Indian Affairs credit program, the Department is not inclined to take such action. If the loans with FmHA are still viable, such a transfer is unnecessary. If the loans are not viable, it does not serve the best interests of the BIA credit program or the Indians served by it to assume responsibility for such loans and reduce our ability to make loans.

Recently, BIA and FmHA officials met with tribal representatives to discuss support for a program of farm loan refinancing on the Fort Berthold Reservation. Our agencies are reviewing a proposal under which the respective agencies would exercise authorities under existing laws and regulations to facilitate the refinancing of viable farming operations through private institutions.

C. The Department has no objection to the establishment of an "Indian desk" within the U.S. Army Corps of Engineers to assist in the resolution of Indian concerns resulting from the operation of the Missouri River reservoirs by the Corps. However, since this particular issue impacts the Corps, your committees may wish to pursue this matter directly with the Corps.

D. The Department is willing to take steps administratively to coordinanate its Fish and Wildlife and Law Enforcement programs with the

Standing Rock Sioux Tribe in order to protect the Tribe's hunting and fishing rights on the reservation in and around Lake Oahe.

The Department has not identified a schedule for implementing the non-legislative recommendations of the Committee. Such a schedule could be developed after further consultation with the Tribes.

This concludes my prepared statement. I would be happy to answer any questions you may have.

PREPARED STATEMENT OF BRIGADIER GENERAL CHARLES E. DOMINY

I am Brigadier General Charles E. Dominy, Division Engineer for the Missouri River Division of the U.S. Army Corps of Engineers.

I am pleased to appear before you today to discuss the Final Report of the Garrison Unit prepared by the Joint Tribal Advisory Committee. Our review of the report has not been completed. I will summarize our preliminary comments on items of direct interest to the Corps of Engineers. With your permission, within 30 days, we will submit to the Committees for the record additional comments on the final report.

BACKGROUND

The Flood Control Act of 1944 authorized the construction of five dams and reservoirs along the main stem of the Missouri River pursuant to the Pick-Sloan Plan. As certain Indian reservations adjacent to the projects would lose land to the flooding by the reservoirs, Congress authorized the acquisition of such lands and specified the compensation to be paid to the affected tribes and individual Indians. There are two laws of direct relevance to the matter at hand. One is Public Law 81-437, 63 Stat 1026 (October 29, 1949), by which the United States acquired lands of the Fort Berthold Reservation for the Garrison Project in North Dakota. The other is Public Law 85-915, 72 Stat 1762 (September 2, 1958), by which the United States acquired lands of the Standing Rock Sioux Tribe for the Oahe project in North and South Dakota. Both laws specified the compensation to be paid, and both laws completely extinguished the Indian interests in the affected properties, except for grazing privileges and mineral interests retained by the Standing Rock Sioux Tribe on the former Reservation lands. In 1962 grazing privileges were restored to the Three Affiliated Tribes in accordance with Public Law 87-695. In 1984, by Public Law 98-602, Congress restored the mineral rights of the Three Affiliated Tribes in the acquired lands of the Fort Berthold Reservation.

The Army Corps of Engineers manages the project lands acquired from these Tribes as well as other project lands acquired from Indians and non-Indians pursuant to the Flood Control Act of 1944 for the following purposes: flood control, hydropower operations, irrigation, navigation, recreation, and wildlife preservation.

We did not have an opportunity to participate in the preparation of the report by the Joint Tribal Advisory Committee. However, based on our preliminary review of the final report, we believe that a number of the recommendations have merit and will work with the Tribes to implement them. Others, though, would be difficult to implement under our existing authorities and mandates, and their economic feasibility has not been established.

Return of Excess Lands

The Committee recommends return of excess lands to the Tribes. We recently reviewed our landholding at both the Oahe and Garrison projects to ascertain whether we held land in excess to project needs. Considering the full array of project purposes served and the need for a buffer for wave action and shoreline erosion, we concluded that there are no lands within the Corps project boundaries which are excess to authorized project needs.

Development of Shoreline Recreation Potential

The Committee noted that there is considerable potential for recreation development and recommends additional recreation development by the Tribes. The Corps of Engineers is and always has been willing to participate with the Tribes in recreation leases and in development of recreation opportunities, as it does with other local entities, pursuant to Federal law and consistent with budget priorities.

Currently, we have four outstanding leases with the Three Affiliated Tribes for recreation purposes, as well as many recreation leases with other local non-Indian entities. Section 1125 of Public Law 99-662 transfers to the Three Affiliated Tribes the Four Bears Recreation Area at Lake Sakakawea which was developed at full Federal expense.

Indian Desk

Among the other items that the Committee deems important is the establishment of an "Indian Desk" within the Corps. We currently have an internal organizational capability to provide special emphasis on Indian affairs and will give this recommendation further consideration. Of course, the Joint Tribal Advisory Committee and other representatives of the Tribes are welcome to visit the Omaha District and Missouri River Division offices at any time to discuss their problems and needs and Corps authorities. They also would be welcome in the Office of the Chief of Engineers to discuss issues of mutual concern.

Hunting and Fishing Rights

Another item of importance to the Committee was protection of the Tribes hunting and fishing rights. As I already mentioned, there are no excess lands within the Corps project boundaries. Because of this and because of the Corps responsibilities to provide fish and wildlife recreation opportunities for general public use, the opportunities to modify jurisdictional prerogatives of the Tribes to regulate hunting and fishing will be limited at best. However, we are willing to coordinate with the Tribes to address hunting and fishing and other fish and wildlife concerns.

Mr. Chairman, this concludes my presentation. Thank you.

PREPARED STATEMENT OF EDWARD LONE FIGHT

Mr. Chairman Inouye, it is my pleasure to appear before your Committee and the other Committees represented here, regarding the report issued by the Joint Tribal Advisory Committee (JTAC) on May 23, 1986.

You have heard the testimony of Mr. C. Emerson Murry, and his colleagues, who served on the Joint Tribal Advisory Committee (JTAC). That federal commission has issued a thoughtful and considered report regarding the impacts of the Pick-Sloan Program on the Three Affiliated Tribes of the Fort Berthold Reservation. You have seen the video presentation portraying in stark terms the human costs associated with the removal and dispersion of the Tribal people in order to make way for the Garrison Dam.

This federal removal of some 480 tribal families--over 90 percent of the tribal population in the 1950s--from the five bottomland communities along the Missouri River has had disastrous and lasting adverse consequences for the Three Affiliated Tribes. This result should come as no surprise. It would come as no surprise to the Missouri River Basin Investigation (MRBI) team, the federal task force that through its experts in 1946-1947 evaluated the feasibility of the removal of the Three Affiliated Tribes in order to make way for the Garrison Dam. That Agency's thirty odd reports on the subject makes clear the hazards to the future tribal well-being if such a policy *were adopted. It would come as no surprise--and it didn't--to the tribal leaders who foresaw the devastating consequences that would befall their people if they were forced to remove. These tribal leaders' stirring and emotion laden speeches in opposition to the injustice of the Garrison Dam are commemorated now among the other great speeches in Indian history. Finally, it would come as no surprise to the BIA, a federal agency that commiserated with the tribal people over their fate, but did very little else. The BIA's message to the tribal people was: reconcile yourself to the coming of the dam--your removal is inevitable.*

However, the Three Affiliated Tribes did not view their removal as inevitable. As the MRBI reports, and other scholarly studies, show the Tribes, unlike the other Great Plains Tribes, were a village agricultural people that had succeeded by the 1940s in building a self-sufficient tribal economy on Fort Berthold. The bottomlands of the Fort Berthold Reservation, according to MRBI reports done near the time of the taking act, abounded in natural resources. The naturally fertile alluvial soils, the natural shelter for the Tribes' livestock herds, the abundant deposits of coal, the standing timber, the availability of seasonal fruits such as juneberries and choke cherries, the extensive habitat for wild game, as well as a plentiful supply of good water for domestic and stock watering purposes, all combined to provide a solid economic base that sustained the Tribes virtually independent of the non-Indian economy around them. The tribal people for the most part, according to the MRBI reports, through a tradition of self-reliance and hard work produced an income from their lands that made them economically self-sufficient. Those bottomlands were characterized by MRBI as constituting a natural factory that provided for the present and future self-sufficiency of the Three Tribes as was contemplated by treaties between themselves and the United States.

The basis for the Tribes' objection to their removal is as simple as it is direct and persuasive: there was no place for them to remove to. The Garrison Dam would flood the last remaining bottomlands on the reservation. Congress initially agreed with the Tribes. They would not have to remove unless a suitable replacement reservation was offered to them. Congress, in the 1947 War Department's Civil Appropriations Act, prohibited that agency from proceeding with the construction of the Garrison Dam until the War Department offered, under statutory terms, lands of sufficient quality and quantity to provide a permanent homeland for the tribes in exchange for their economic and social base that was to be taken as the site for the Garrison Dam. The Secretary of the Interior read Section 6 of that statute as requiring the federal government to compensate the tribes on "a replacement cost basis." The federal government was required to replicate, not only the land base, but the infrastructure necessary to the continued existence of Fort Berthold as an agricultural reservation as was contemplated by federal treaty and statute. See Report and Recommendations to the Commissioner of Indian Affairs on the Offer of Lieu Lands to the Indians of the Fort Berthold Reservation, North Dakota by the Honorable the Secretary of War, November 21, 1946.

If the statutory purpose and intent of Section 6 had been achieved the Tribes would likely not be here. However, the Secretary of War failed to find suitable replacement lands that met the statutory mandate. The War Department then persuaded Congress to eliminate the Indian clause limitation on the construction of the Garrison Dam. Congress, recognizing that a replacement reservation could not be provided, undertook to provide a cash equivalent of the economic and social base that accorded with the same standard of substitute or replacement value. The Missouri River Basin Investigation's had already described in depth and detail the complex and costly rebuilding and rehabilitation program that would be necessary if the tribal people were removed and they had to rebuild their tribal economic and culture life from "square one."

Let me emphasize here that the Tribes no longer had any choice but to remove--the only issues open for discussion with the Corps of Engineers was the timing and circumstances of that removal. Virtually no attention was paid to the MRBI recommendations regarding the steps the federal government had to take to ensure that Tribes were successfully reestablished on the high plains of the residual reservation.

Congress, recognizing that a replacement reservation could not be provided, undertook to provide the Tribes with the cash equivalent of their economic base which accorded with the same standard of substitute or replacement compensation. The Congressional intent in Pub. L. 81-437 to accord the tribes full indemnity value, as against mere fair market value, for the taking of their treaty protected economic base is clearly reflected in the legislative history of that statute. Congress recognized that the payment of fair market value, as if the tribes were mere private condemnees, would neither adequately compensate the tribes nor enable them to continue as a self-sufficient treaty protected tribal government. This recognition *is based expressly on the federal reports indicating that the residual lands of the reservation would be insufficient to support the existing ranching and farming industry of the tribes.*

Ultimately, however, Congress because of budgetary constraints failed to pay the Tribes compensation that accorded with the principle of substitute, or replacement, valuation. For example, the House of Representatives reported out its version of H.J. Res 33 that called for a payment of $17,105,625. This amount was acknowledged by the House as falling below the standard of replacement valuation, to the tribes. But $12.6 million was the amount that was offered by Congress, after final conference between the two Houses, to the Tribes on a "take it or leave it basis" of compensation. The Tribes, aware that they were to be removed in any event, and likely left destitute, reluctantly voted to accept the terms of the settlement imposed by the terms of Pub. L. 81-437 on March 15, 1950.

The Tribes were to be permanently reestablished, at the expense of the federal government, pursuant to Section 2 (b) and (c) of Pub. L. 81-437 on the residual lands of the reservation. The reconstruction of the Tribes' economic and community life was to be assumed as a direct federal responsibility. See, H. Rep. No. 544 at p.3. The reestablishment program had three aspects: (1) the reestablishment of the Tribes' real and personal property on the lands of the residual reservation; (2) the reestablishment of the tribal cemeteries, shrines and monuments; and (3) the reestablishment of Tribal buildings and facilities. See Cong. Rec. p. 8929 (July 6, 1949). The Commissioner of Indian Affairs was directed by the statute, to carry out the removal and relocation of the Tribes

$800,000 ÷ $3,200,000 = 25% rate

Applying the Indirect Cost Rate to Federal and State Contracts

To pay for the costs included in the indirect cost budget, the IG directs each tribe to charge a portion of those costs to each of the tribe's contracts. This amount is determined by multiplying the tribe's indirect cost rate times the amount of direct cost received under the contract.

	Estimated Contract Amounts		Indirect Rate		Estimated Maximum Federal Indirect Contribution
JOM	$1,000,000	x	25%	=	$250,000
CHR's	500,000	x	25%	=	125,000
Social Services	1,000,000	x	25%	=	250,000
Headstart	700,000	x	25%	=	175,000
	$3,200,000				$800,000

This system works on the assumption that all federal and state agencies will make available to tribes, as part of their grants and contracts, fair shares of the indirect costs incurred. Unfortunately, the statutes and/or regulations implementing certain programs limit the amount of indirect costs which the program will pay. In addition, some programs lack the dollars required to cover 100% of their share of the tribe's indirect cost budget. As a result, the IG's calculations are made knowing full well that many federal and state agencies are either unwilling or unable to pay the full amounts allocated to their grants or contracts.

What Happens When an Agency Refuses to Pay Its Full Indirect Cost Share

To be eligible for any federal indirect costs a tribe must sign an agreement with the IG obligating the tribe to incur and pay from funds collected either from the federal or tribal government all of the costs listed in its indirect cost budget.

Because the tribe usually has no other mechanism to pay indirect costs, it must sign the agreement or be unable to pay the costs associated with its federal government grants and contracts. Unfortunately, many programs, such as HHS Aging, which are the least capable of paying their fair shares of the indirect costs are also the programs most in demand on the reservation. They are also the least likely to be assumed by the federal government if the tribe ceases to contract.

As a result, many tribes enter agreements which both they and the IG know are unrealistic. Unfortunately, it is the tribe which suffers the consequences when the federal funds together with amounts contributed from tribal funds do not cover the total amount of indirect costs in the agreement. To reconcile this accounting problem, the federal government has created the concepts of theoretical over and under recovery. These are "debts" to the federal government which "carry forward" into future fiscal years.

Calculating the Theoretical Over and Under Recovery Debt

After a tribes contracts are closed out and audited, the IG's auditors simply compare what the tribe actually collected from the federal government and tribal funds with the amount it promised to collect in its indirect cost agreement.

The purpose of this exercise is to reconcile the estimates contained in the IG agreement with the actual amounts of contract dollars obtained, indirect costs incurred and indirect cost dollars contributed.

If the audit shows that the total indirect dollars contributed, including tribal contributions, is greater than the actual amount of direct dollars obtained times the rate agreed upon in the IG agreement, a theoretical under recovery debt results. Under recovery indicates that the amount agreed to was under the amount actually collected.

See the following example: Using a 25% indirect cost rate and assuming the tribe contributed $10,000:

Figures in IG agreement

	Estimated Contract Amounts		Rate		Estimated Maximum Federal Contribution
JOM	$1,000,000	x	25%	=	$250,000
CHR's	500,000	x	25%	=	125,000
Social Services	1,000,000	x	25%	=	250,000
Headstart	700,000	x	25%	=	175,000

Audited Figures for FY 1986 at 25%

	Estimated Contract Amounts		Rate		New Maximum Federal Contribution
JOM	$ 500,000	x	25%	=	$125,000
CHR's	500,000	x	25%	=	125,000
Social Services	700,000	x	25%	=	175,000
Headstart	700,000	x	25%	=	175,000
					$600,000

	Actual Contract Amount From Audit	New Adjusted Maximum Federal Contribution	Actual Federal Indirect Cost Contribution From Audit	Difference
JOM	500,000	$125,000	$225,000	+ $100,000
CHR's	500,000	125,000	125,000	-0-
Social Services	700,000	175,000	225,000	+ 50,000
Headstart	700,000	$175,000	70,000	- 105,000
		$600,000	$645,000	+ $ 45,000

Actual Federal Indirect Cost Contribution:	$645,000
New Adjusted Maximum Federal Contribution:	-600,000
	45,000
Tribal Contribution	+ 10,000
FY 1986 THEORETICAL UNDER RECOVERY DEBT:	$ 55,000

If the indirect cost dollars contributed, including tribal contributions, is less than the amount promised in the IG agreement a theoretical over recovery debt results. Over recovery means the amount agreed to was over the amount actually collected.

See the following example: Using a 25% indirect cost rate and assuming the tribe contributed $10,000:

	Actual Contract Amounts	New Adjusted Maximum Federal Indirect Contribution	Actual Federal Indirect Contribution	Difference
JOM	$1,000,000	$250,000	$225,000	$ 25,000
CHR's	500,000	125,000	125,000	-0-
Social Services	1,000,000	250,000	225,000	25,000
Headstart	700,000	175,000	70,000	105,000
	$3,200,000	$800,000	$645,000	$155,000

$800,000 - New Adjusted Maximum Federal Indirect Contribution
-645,000 - Actual Federal Indirect Contribution
- 10,000 - Tribal Contribution

$145,000 - FY 1986 THEORETICAL OVER RECOVERY DEBT

The Impact of These Debts on Future Fiscal Years

Most programs are not audited immediately after the end of a given fiscal year. Therefore, discovery of theoretical under and over recovery debts is delayed and their resolution is postponed for at least two years. For example, if the above calculations represent FY 1986 figures, and the programs were not audited until February or March of FY 1987, these debts would not be discovered in time to adjust the tribe's FY 1987 budget. As a result, they would be carried forward and resolved as part of the tribe's FY 1988 indirect cost negotiations. The following will explain how this "carry forward" works.

FY 1988 Indirect Cost Calculations

In FY 1988, the IG would use the tribe's anticipated FY 1988 indirect cost expenses to determine the amount of costs the tribe would be required to incur and pay. The maximum federal indirect contribution would, however, be reduced by the amount of any over recovery "debt", and increased by the amount of any under recovery debt. That new figure is used in the place of the "total expenses" in calculating the FY 1988 indirect cost rate. In the following example, for purposes of clarity it will be assumed that all of the contract amounts and indirect cost expenses remain the same as they were in FY 1986 except that there was a previous $45,000 theoretical over recovery debt.

	Estimated Contract Amounts		Estimated Indirect Cost Expenses
JOM	- $1,000,000	Utilities	- $125,000
CHR's	- 500,000	Rent and Main.	- 250,000
Social Services	- 1,000,000	Accounting	- 100,000
Headstart	- 700,000	Audits	- 325,000
	$3,200,000		$800,000

If there had been no "debts", the rate would have been as follows:

Estimated Total Expenses	$ 800,000	
Estimated Total Contracts	$3,200,000	= 25%

Because there were "debts", they must be subtracted from the tribe's budgeted indirect cost expenses:

$ 800,000 - Estimated Indirect Cost Expenses
-145,000 - FY 1986 Theoretical Over Recovery Debt

$ 645,000 - FY 1988 Estimated Maximum Federal Contribution

The figure derived is used to calculate the FY 1988 rate, as follows:

Estimated Maximum Federal Contribution (expenses)	$ 645,000	
Estimated Total Contracts	$3,200,000	= 20%

Remember, however, that under the tribe's IG agreement it is obligated to incur indirect expenses at the pre-calculation level, $800,000. As a result, two sets of figures are created: the amount which must be expended for each program and the maximum federal contribution toward that expenditure.

Assuming that each agency contributes in FY 1988 the full 20%, a $150,000 over recovery would result:

	Actual Contract Amounts From Audit	Obligation Under IG Agreement	Actual Federal Indirect Contribution	Difference
JOM -	$1,000,000	$250,000	$200,000	$ 50,000
CHR's -	500,000	125,000	100,000	25,000
Social Services -	1,000,000	250,000	200,000	50,000
Headstart -	700,000	175,000	140,000	35,000
	$3,200,000	$800,000	$640,000	$160,000

$800,000 - Obligation Under IG Agreement
- 640,000 - Actual Federal Indirect Contribution
- 10,000 - Tribal Contribution

$150,000 - FY 1988 THEORETICAL OVER RECOVERY DEBT

Assuming, however, that each federal agency contributes the same percentage of total indirect cost fees for its programs as it did in FY 1986, and that the tribe is only able to contribute the same $10,000 it contributed in FY 1986, an even larger under recovery "debt" would result, for example:

	Actual Contract Amounts From Audit	Obligation Under IG Agreement	Actual Federal Indirect Contribution	Difference
JOM -	$1,000,000	$250,000	$180,000	$70,000
CHR's -	500,000	125,000	100,000	25,000
Social Services -	1,000,000	250,000	180,000	70,000
Headstart -	700,000	175,000	70,000	105,000
	$3,200,000	$800,000	$530,000	$270,000

$ 800,000 - Obligation Under IG Agreement
- 530,000 - Actual Federal Indirect Contribution
- 10,000 - Tribal Contribution

$ 260,000 - FY 1988 THEORETICAL OVER RECOVERY DEBT

Assuming that the total contract dollars remain at $3,200,000 the tribe's rate of collection has dropped from 25% to 20% in just four years. Absent a large contribution of tribal funds to offset the low federal contributions, the amount of theoretical under and over recovery debts will continue to grow until the tribe has a 0% indirect cost rate, and no ability to recover these expenses from the federal government.

Conclusion

Because these problems originated some years ago, many tribes are rapidly approaching this 0% indirect cost rate; and if the situation is not resolved, many will go bankrupt or be forced to retrocede their contracts. A few tribes have been able to avoid this problem by using large amounts of tribal funds to supplement their indirect cost budgets. They have in effect, been paying to contract with the federal government. This was never the intent of the Indian Self-Determination Act. In recent years, federal budget cuts and declining resource markets have forced even tribes relatively economically well-to-do to reduce their contributions to indirect costs. Most tribes are, therefore, falling prey to the national indirect cost problem.

Recommendations

Oversight hearings on the issue would benefit all of the parties involved and lead to a legislative solution to the long-range problem. As an intermediate measure, we encourage Congress to enact legislation eliminating all tribal theoretical under and over recovery debts which were not the result of fraud or misuse of federal funds. By taking this action, the Congress could relieve the most critical financial pressures on the majority of tribal governments, and provide some time fully to investigate and propose a legislative alternative to the current system.

TRIBAL GOVERNMENT RECOMMENDATIONS FOR AMENDMENTS TO PL 93-638

INDIRECT COSTS

SELF DETERMINATION SHOULD BE THE MAJOR EMPHASIS OF PL 93-638. FOR ANY TRIBE TO HOPE TO ACHIEVE ANY PROGRESS TOWARD SELF DETERMINATION, IT MUST HAVE SOME CONTROL OF ITS FINANCES. THE PRESENT PROCEDURES FOR RECOVERY OF INDIRECT COSTS FROM CONTRACTS PLACES THE CONTROL OF TRIBAL FINANCES IN THE HANDS OF FEDERAL PROGRAM OFFICERS AND THE OFFICE OF THE INSPECTOR GENERAL, SINCE THEY DETERMINE IF TRIBES WILL RECEIVE INDIRECT COST FUNDS AND HOW MUCH. THE INSPECTOR GENERAL THEN ISSUES AN AGREEMENT, WHICH IF THE TRIBE SIGNS IT, PLACES ON THE TRIBE THE RESPONSIBILITY FOR MEETING THOSE QUOTAS FOR INDIRECT COST FUND RECOVERY THAT FEDERAL AGENCIES FAIL TO MEET.

FURTHER, THE TIMING OF THE AWARD OF THE INDIRECT COST RATE WELL AFTER THE START OF THE FISCAL YEAR AND WELL AFTER THE TRIBES GENERAL ACCOUNT BUDGET HAS BEEN FINALIZED, FORCES THE TRIBES TO REDO THEIR BUDGET WELL INTO THE BUDGET YEAR.

THE PROCESS WOULD BE A WORKABLE ONE FOR TRIBES, IF FUNDING WITH LEGISLATIVE RESTRICTIONS ON THE USE OF ADMINISTRATIVE OR INDIRECT COSTS WAS REMOVED FROM THE DIRECT COST BASE USED FOR CALCULATING OVER RECOVERY.

LEGISLATIVE RECOMMENDATIONS

1. CONGRESS SHOULD DEFINE CONTRACT SUPPORT AS BEING INDIRECT COSTS AND DEFINE INDIRECT COSTS TO MEAN "THOSE COSTS WHICH DERIVE FROM APPLYING THE TRIBE'S COST RATE, AS APPROVED BY THE COGNIZANT AGENCY, TO THE DIRECT COST BASE.

2. CONGRESS SHOULD "DIRECT THE BIA AND IHS TO FULLY FUND TRIBAL INDIRECT COSTS FOR PL 93-638 CONTRACTS AND GRANTS, IN ADDITION TO THE DIRECT COST BASE."

3. CONGRESS SHOULD DIRECT THE BIA AND IHS TO INCLUDE ACCURATE ANNUAL ACCOUNTING OF THE AMOUNTS OF FUNDS NEEDED TO FUND TRIBAL INDIRECT COSTS FOR PL 93-638 CONTRACTS AND GRANTS, AS A SUBACTIVITY OF EACH ACTIVITY IN THE ANNUAL BUDGET JUSTIFICATIONS TO CONGRESS.

4. ANY SHORT FALL IN INDIRECT COST APPROPRIATIONS SHALL BE TAKEN FROM BIA GENERAL ADMINISTRATION AND FROM IHS "DIRECT OPERATIONS."

5. THE DEPARTMENT OF THE INTERIOR OFFICE OF THE INSPECTOR GENERAL SHALL NOT INCLUDE IN THE DIRECT COST BASE, FOR PURPOSES OF CALCULATING OVER RECOVERY, FUNDING THAT IS RESTRICTED IN USE FOR ADMINISTRATIVE OR INDIRECT COSTS RECOVERY.

PREPARED STATEMENT OF LIONEL JOHN

Good afternoon, Mr. Chairman and members of the Committee. My name is Lionel R. John, Executive Director of the United South and Eastern Tribes. I will make comments on the contrasting process for P.L. 93-638 as utilized by the Indian Health Service and the Bureau of Indian Affairs.

First, let me state that P.L. 93-638 as legislated in 1975 had the right direction intending to provide tribes with the opportunity to assume certain Federal Government functions through contracts or Grants. Now, after over a decade of experience, it is clear that the original intent has been complicated by the application of regulations and policies by IHS and BIA that have altered the original intent.

A great amount of testimony has been presented in the past several years to address the difficulties the tribes have experienced in contracting under P.L. 93-638. Congress has recognized these problems and made efforts to improve the situation by enacting P.L. 95-224 the Federal Grant and Cooperative Agreement Act of 1977 and P.L. 98-250 which amended P.L. 93-638 in 1984.

While Congress took these actions, the Federal Agencies, BIA and IHS, have blatently ignored this action by failing to implement these Act and so far, have not even developed any Regulations or Rules to use for these Acts. Thus, it appears that what is needed is Congressional language to control the behavior of the agencies.

In addition, the orginal act provided a provision to grant waivers for certain situations, but so far the waiver process has not been utilized to work out problems. Instead, the agencies encourage tribes not to pursue waivers because the process is too tedious and lengthy to obtain an approval from the respective Secretary.

The list of issues goes on and on, however with the shortness of time I will point out that the foremost underlying problem has been the fundamental basis of the Act P.L. 93-638. This problem is the perceived basis of the Act of transferring of federal functions to the tribes imposing a threat to the Federal employees in losing their jobs which affects liens, mortgages, cars and turf issues of power and control. The Federal employees under these perceptions have behaved in a self-preservation manner and have structured rules and policy accordingly.

With this in mind, it may be necessary to either enact a new law or amend P.L. 93-638 in such a way to include specific language to mandate actions by the BIA and IHS and to bring back the first intent of a Government to Government relationship with the tribes.

If a new law is enacted, it must include a method to assure the same level of enforceability from the tribes standpoint as has been exercised by the Federal agencies. An example of this problem is the IHS recently cancelling some contracts with the tribes which had provided for tribal space to be used to provide health care. IHS said it wrote up the contracts incorrectly, thus giving it the right to cancel, while tribes believed that a contract was a contract.

The tribes must also retain their preference in using whichever instrument they choose whether it be a contract, grant cooperative agreement or a new instrument.

Thank you for allowing me to comment on the contracting process for P.O. 93-638.

PREPARED STATEMENT OF ERIC D. EBERHARD

I want to express my thanks to the Committee for inviting me to participate in this oversight hearing on P.L. 93-638. I also want to commend the Committee for its efforts to improve the self-determination law.

P.L. 93-638 has proven to be an important part of the long standing federal policy to promote Tribal self-governance. This is not to say that all has gone well for the Tribes, the Bureau of Indian Affairs and the Indian Health Service in their efforts to implement the law. There have been both demonstrable successes and some failures under the self-determination act.

One policy goal of P.L. 93-638 was to:

> . . . permit an orderly transition from federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct and administration of those programs and services.
>
> P.L. 93-638, Section 3(b)(1975)

The methods chosen by the Congress to implement this policy were initially grants and contracts. In 1984, Congress added cooperative agreements to the authorized methods for effecting the policies of the self-determination act. P.L. 98-250, 98 Stat.118 (April 3, 1984).

Many of the problems which have arisen in the implementation of P.L. 93-638 are traceable to the fact that both the BIA and IHS have tended to view the Act as a procurement law. This approach to implementation has necessarily resulted in a cumbersome contracting process which is layered with detailed regulatory requirements. See, for example, 25 CFR, Subchapter M and 41 CFR Part 114H. See also, Oversight of Indirect Costs and Contract Provisions of the Indian Self-Determination and Education Assistance Act, Hearing Before the Senate Select Committee on Indian Affairs, June 30, 1982 (97th Cong., 2nd Sess.) The BIA has acknowledged that the procurement approach to self-determination contracts, grants and agreements may operate to frustrate the Congressional policy of ending federal domination of Indian programs:

> Contracting by its very nature places Bureau officials in the dual position of assisting Indian Tribes, in many instances, by furnishing technical assistance in preparation of contract proposals and of carrying out their fiscal and administrative responsibilities as officials of the federal government. It is recognized that very often these two positions are in opposition to each other . . . .
>
> 25 CFR Section 271.4(g)

I respectfully suggest that it is time to direct the implementation of P.L. 93-638 away from "procurement" and toward an approach which will more fully enhance Tribal self-governance. To some extent the problems in implementation of the self-determination act reflect issues related to definitions of contracts, grants and cooperative agreements. The Federal Grant and Cooperative Agreement Act of 1977, P.L. 95-224 (codified at 31 U.S.C. Sections 6301 through 6308) is a helpful tool for understanding how these different forms of agreement are used by federal agencies. P.L. 95-224 was specifically enacted to provide federal agencies with guidance on the appropriate use of procurement contracts, grants and cooperative agreements. It should be noted that pursuant to P.L. 98-250, Congress clearly provided that Indian self-determination contracts, grants and cooperative agreements are not subject to the requirements of the Federal Grant and Cooperative Agreement Act unless the appropriate Secretary and the contracting Tribe mutually agree to utilize a grant agreement or cooperative agreement. Nevertheless, reference to P.L. 95-224 is helpful in achieving some understanding of the types of relationships contemplated by the different forms of agreements.

P.L. 95-224 directs federal agencies to use a procurement contract when:

> . . . the principal purpose of the instrument is the acquisition, by purchase, lease or barter, of property or services for the direct benefit or use of the federal government, . . .
>
> P.L. 95-224, Sec. 4(1)

Grant agreements are the appropriate form of agreement when the federal purpose is to transfer:

> . . . money, property, services or anything of value to the state or local government or other recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than by acquisition, by purchase, lease or barter, of property or services for the direct benefit or use of the Federal government; . . .
>
> P.L. 95-224, Sec. 5(1)

Grant agreements are also to be utilized in the situation where "no substantial involvement" is anticipated between the grantee and the federal agency during the grant period. P.L. 95-224, Sec. 5(2).

Cooperative agreements are the prescribed method of doing business when it is anticipated that there will be "substantial involvement" of the federal agency during the performance of the agreement, P.L. 95-224, Sec. 6(2), and the purpose of the agreement is to transfer:

> . . . money, property, services, or anything of value to the state or local government or other recipient to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than by acquisition by purchase, lease, or barter, or property or services for the direct benefit or use of the Federal government, . . .
>
> P.L. 95-224, Sec. 6(1)

If we contrast these requirements of P.L. 95-224 with the policy goals of P.L. 93-638 it becomes clear that there should be a special definition for the type of agreements contemplated by the self-determination act. Contracts, grants and cooperative agreements entered into under P.L. 93-638 have as their principal purpose the goal of reducing federal domination of Indian programs and enhancing tribal self-governance. At the same time, the federal government is variously acquiring goods or services and transferring funds for the benefit of Indian Tribes or their members. Moreover, agreements under the self-determination act are entered into in the context of the unique government-to-government and trust relationships which exist between the Tribes and the United States.

In order to move the self-determination contracting process away from a procurement approach and to better promote Tribal self-governance, the Congress could amend Section 4 of P.L. 93-638 to provide a definition which encompasses the kinds of agreements to be entered into. For purposes of discussion, I would like to suggest that we characterize agreements entered into under P.L. 93-638 as intergovernmental contracts. Such contracts could be defined as follows:

> An intergovernmental contract is any agreement entered into pursuant to this Act between an Indian Tribe or Tribal organization and an agency of the United States for the purpose of permitting Indian participation in the planning, conduct and administration of programs or services which are otherwise provided to Indian Tribes and their members pursuant to federal law; Provided that no intergovernmental contract shall be construed to be a contract for procurement unless mutually agreed to be such by the appropriate Secretary and the Tribe or Tribal organization involved.

If this definition were to be adopted, then Sections 102, 103, 104 and 106 of the self-determination act should be amended to delete the terms "contract" and "grant" and to insert the term "intergovernmental contract" as appropriate. In addition, the provisions of Section 106 which provide for the application of federal contracting laws should be amended to provide that such laws will only be applied when mutually agreed to by the Tribe and the appropriate Secretary. The Committee may want to consider as an alternative the adoption of language on this point similar to that proposed in H.R. 1223 at Section 7, which provides for waivers of federal contracting laws and appeals and hearings when waivers are denied.

In addition to redefining the agreements entered into under P.L. 93-638, I would like to suggest several other changes to the existing law. First, some recognition should be given to the fact that many Tribes now have a substantial body of experience in the successful operation of federal programs. Under the current law, no contract, grant or agreement may exceed three years in duration. While this restriction may make sense from a procurement point of view, one can question whether it really promotes the policies underlying P.L. 93-638. Consideration should be given to amending Section 106(c) of the Act to provide for agreements with a duration of five to seven years where the Tribe has previously operated the program for a period of three years without major audit exceptions. I believe that these longer term agreements would enable the Tribes to more effectively plan for and administer the programs which are contracted. If the Committee considers approving agreements of a longer term, then the Committee should also consider adopting language which would assure a base level of funding for implementation of those agreements. Without some assurances on funding, the stability of these agreements will come into question.

Second, I believe that the Committee should give some consideration to a streamlined approach for those Tribes which operate more than one program under P.L. 93-638. For example, if a tribe currently has four 638 contracts and has operated the programs encompassed in those contracts for a period of three years without major audit exceptions, then the Tribe ought to be able to enter into one long term intergovernmental contract to permit it to continue to operate all four programs.

Third, with respect to new contract applications, some consideration should be given to a formal procedure wherein the Tribe would provide advance notice of its intent to contract. Upon receipt of such notice the appropriate Secretary would be required to provide the Tribe with technical assistance to aid the Tribe in planning, budgeting, preparation of the contract application and pre-resolution of any declination issues. The goal would be to ensure that the Tribe has available to it the best possible resources and personnel as it begins the 638 process, rather than after the process has already begun. To some extent, the procedure for this is already provided. The grant provisions of Section 104 of the act are clearly intended to assist Tribes in their efforts to enter into contracts. Section 271.17 of the regulations also attempts to address the pre-application period by providing for technical assistance. I am suggesting that a more formal process would better serve the policy goals of the Act.

Fourth, some limitation should be placed on the use of unilateral modifications of P.L. 93-638 contracts by the BIA and IHS. I suggest that unilateral modifications be generally prohibited except where necessary to reflect a decrease in appropriated funding. The Committee may want to consider bill language on this point similar to that proposed in Section 8(2) of H.R. 1223.

Mr. Chairman, members of the Committee, I again thank you for inviting me to testify before you. I hope that you will find some of these suggestions helpful as you consider what steps need to be taken to make P.L. 93-638 more effective.

PREPARED STATEMENT OF JOHN LEWIS

P.L. 93-638, the Indian Self Determination and Education Assistance Act is a forceful and clear statement of policy by the Congress that calls for maximum Indian participation in the Government and education of the Indian people, for the full participation of Indian governments in Indian programs and services conducted by the Federal government and the development of human resources of the Indian people.

However, numerous issues and problems have been identified and argued about with the implementation of P.L. 93-638. Many of the issues center around the contracting process, levels of funding and regulatory requirements for contracting. Further the Federal agencies most affected by the legislation, the Bureau of Indian Affairs and the Indian Health Service, and the tribes have often found themselves in adversarial positions in attempting to address and solve the issues of "638" contracting. In 1985 the tribes in Arizona, Nevada and Utah made specific recommendations regarding issues and recommendations for amending P.L. 93-638. (See attachment)

Planning for Services

A major problem has been that the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) have limited programs and services that do not adequately meet the needs of Indian people. As a result Indian governments have had to identify and access other resources to provide a more comprehensive range of needed services and programs.

In addition to the Bureau of Indian Affairs and the Indian Health Service, Indian governments access resources from other federal agencies such as Department of Labor, Housing and Urban Development, numerous other Health and Human Service Agencies, state agencies and tribal funds in order to provide services to their populations. Intergovernmental agreements, cooperative agreements as well as purchase of service contracts and grants have been used as mechanisms to access resources.

Additionally tribal service priorities have many times been different from BIA or IHS services priorities. For example, BIA child welfare service emphasize out of home placement of children whereas tribal child welfare objectives are to maintain families so that a children may remain in their homes. For IHS, prevention of disease has not been a priority as indicated by the allocation of resources and the medical priorities listing. However, tribes believe that disease prevention in the long term would be less costly than the treatment of diseases. Tribal and federal agency priorities need to be consistent in order to plan and deliver appropriate and needed services.

During the last fifteen years Indian governments have developed considerable experience in planning and administering programs and services for their populations and in the process have had to respond to and comply with numerous regulations and requirements from an array of funding agencies.

This process involves identification of needs, identification of service populations, identification of new resources to provide new services; improvement, expansion and integration of existing services; establishing priorities;

establishing policies that guide the direction of the programs; and monitoring and evaluating programs and services for purposes of planning and program development.

P.L. 93-638 very clearly states that maximum participation by Indian Tribes in the direction of services to "render such services more responsive to Indian communities" is assured by Congress. Participation of Indian Tribes in the direction of federal services must necessarily and appropriately include planning. A more defined process for the participation of Indian tribes in planning the direction of BIA and IHS is needed.

To recognize the full potential of P.L. 93-638 and to provide needed services to Indian people, the tribes and the Bureau of Indian Affairs and the Indian Health Services must plan together for programs and services to improve the health and welfare of Indian people. The tribes are demonstrating their abilities and capabilities to plan, coordinate and administer programs. However, the goals and the priorities of the federal agencies need to be consistent with those of the Indian tribes. This can be accomplished only with full participation by the Indian governments and the federal agencies as partners in the planning process.

Evaluation of Federal Functions

Another major issue has been the confusion over what responsibilities the federal agencies are to maintain, what functions are to be performed by the federal agencies once a program or service is contracted by a tribe and how those functions are being carried out. How does the federal agency delegate its government functions through a contractual arrangement, yet not abrogate its responsibility for those functions?

To better address these questions it is appropriate that the tribes and federal agencies evaluate the extent to which the federal programsc including tribal contracted programs, serve the needs of the Indian communities.

The federal agencies that provide the resources and the Indian governments that provide the services would need to be equally involved in this activity. The outcomes of the evaluation need not be seen as a mechanism to negatively impact either tribal programs or the Bureau functions if evaluation is viewed as a part of the planning process.

Evaluation may be defined as "assessing the extent to which a program causes desired changes in the target population". However, evaluation may also have another component. That component is a problem solving process. If functions and services are identified by the evaluation as problem areas it would then become appropriate to incorporate corrective actions into the planning process.

Allocation of Resources

Presently, the Indian Health Service is attempting to allocate IHS resources through the Resource Allocation Methodology (RAM). The purpose of RAM is to equitably distribute the limited IHS resources based on need and performance of IHS and tribally operated health programs.

The rational by IHS for developing this methodology for distribution of funds is the Ninth Circuit Court of Appeals, decision in Rincon Band of Mission Indians v. Harris and Congress. Both have instructed IHS to allocate resources in an equitable manner rather than on a "program continuity basis."

Major problems exist with this methodology. However, it is an attempt by IHS to equitably distribute and allocate resources. Throughout this process IHS has attempted to inform tribes about their efforts and has tried to be responsive to tribal concerns. However the tribes did not participate in the initial development of the methodology and therefore were not involved in the planning.

The Bureau of Indian Affairs has used the Indian Priority System (IPS) to allocate resources based on a process by which tribes have prioritized their concerns. Again, the tribes did not participate in the development of the Indian Priority System.

Both the BIA and the IHS have large budget items that are not included in the allocation formulas for distribution to tribal programs, service units and agency level operations.

Indian governments need to fully participate in the budget formulation and allocation at all levels. At the tribe/agency, service unit and the Area Office levels:

- Tribal governments in each Agency and Area should have the opportunity to formally approve funding allocation plans after Congress appropriates funds.

- Tribes should fully participate in planning for budget allocation at both the tribe/agency and the Area levels.
- The Indian Priority System needs to be modified to allow tribes to define spending priorities by program, instead of by aggregate funding levels for Agencies.
- IPS budgets should be used to enable tribes to adopt allocation plans at the Area and Agency levels each year after Congress has appropriated funds. Tribes should formally adopt spending plans.
- Congress should direct the BIA to make available to tribes section 104 grant funds to conduct functional evaluations of Area Offices, in order to develop long-range plans for allocation of resources.

In closing, the federal agencies, specifically the Bureau of Indian Affairs and the Indian Health Service, need to seriously pursue the policy of "maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render services more responsive to the needs and desires of those communities."

To accomplish this goal the federal agencies would need to recognize the Indian governments as partners rather than just purchase of service contractors. This approach would emphasize the building and strengthening of the working relationship between IHS and the tribal governments and BIA and the tribal governments. The working relationship between the federal agencies and the tribes would be flexible and compromising in the planning, development, negotiation, administration and evaluation of contracts.

This approach would require a high degree of cooperation and interaction between the BIA and the Tribes and the IHS and the Tribes, particularly in designing appropriate services and activities, budgeting, defining monitoring responsibilities and utilizing evaluation approaches that provide mutually beneficial data and information.

Thank you for the opportunity to address this committee.

CALCULATION OF DIRECT COST BASE

CONTRACTS	AWARD	PASS-THRU	DIRECT COSTS
JOB TRAINING	500,000	(1) 300,000	200,000
HEAD START	600,000	(2) 30,000	570,000
TRIBAL COURT	350,000	(2) 15,000	335,000
CHILD WELFARE	400,000	(3) 300,000	100,000
ELDERLY NUTRITION	130,000	(4) 75,000	
	55,000		
TOTALS	1,980,000	720,000	1,260,000

(1) Training stipends
(2) Equipment & subcontracts
(3) Foster child care subcontracts
(4) Bulk food purchases

Quoting directly from the Indirect Cost Agreement "Pass-through funds are normally defines as; major sub-contracts, payments to participants, stipends to eligible recipients, and subgrants, which normally require minimal administrative effort."

INDIRECT COST POOL

SALARIES & FRINGE		
ADMINISTRATIVE	@50%	75,000
FINANCE OFFICE	@100%	125,000
SUPPLIES	@100%	15,000
TRAVEL	@100%	15,000
BUILDING LEASE	@100%	40,000
LIABILITY INSURANCE	@100%	30,000
AUDIT	@100%	15,000
TOTALS		315,000

THE DETERMINATION OF WHAT IS AN INDIRECT ELIGIBLE COST AND WHAT IS NOT, IS GENERALLY DEFINED IN OFFICE OF MANAGEMENT AND BUDGET CIRCULAR A-87, BUT IS PART OF THE NEGOTIATIONS BETWEEN THE TRIBE AND THE INSPECTOR GENERAL'S OFFICE BEFORE ANY PROPOSED INDIRECT COST RATE IS FINALIZED AND APPROVED. SOME ITEMS, SUCH AS SALARIES AND FRINGE OF OFFICERS AND COUNCIL ARE APPROVED AT A LESS THAN 100% LEVEL.

FY 1986 AUDIT -

CONTRACT	ACTUAL DIRECT COSTS	ACTUAL INDIRECT COSTS
JOB TRAINING	290,000	72,500
HEAD START	575,000	35,000
TRIBAL COURT	335,000	83,750
CHILD WELFARE	110,000	27,500
ELDERLY NUTRITION	55,000	10,000
TOTAL	1,365,000	228,750

ACTUAL DIRECT COSTS MULTIPLIED BY THE FY 1988 INDIRECT COST RATE DETERMINES THE FIGURE THAT WILL BE COMPARED WITH THE ACTUAL INDIRECT COSTS TO FIND THE AMOUNT OF THE OVER OR UNDER RECOVER, FOR THAT YEAR. ($1,365,000 X 25%) $341,250.

SUPPOSING THA THE TRIBE CONTIBUTED $50,000, THE OVER RECOVERY WOULD BE $291,250 LESS $228,750 OR $62,500.

OVER RECOVERY FY 1986 IS $62,500

FY 1988 Audit

Contract	Actual Direct Costs	Actual Indirect Costs
Job Training	290,000	58,000
Head Start	565,000	35,000
Tribal Court	330,000	66,000
Child Welfare	115,000	23,000
Elderly Nutrition	52,000	8,000
Total	1,620,000	190,000

ACTUAL DIRECT COSTS MULTIPLIED BY THE FY 1986 INDIRECT COST RATE DETERMINES THE FIGURE THAT WILL BE COMPARED WITH THE TOTAL INDIRECT COST POOL TO FIND THE AMOUNT OF THE OVER OR UNDER RECOVERY, FOR THAT YEAR. ($1,365,000 X 20%) $270,400.

SUPPOSING THAT THE TRIBE CONTRIBUTED $50,000 THE OVER RECOVERY WOULD BE $220,400 - $190,000 OR $30,400.

OVER RECOVERY FY 1988 IS $30,400.

STILL A DEBT IS FY 1986 OVER RECOVERY OF $62,500

TRIBAL GOVERNMENT RECOMMENDATIONS FOR AMENDMENTS TO PL 93-638

INDIRECT COSTS

SELF DETERMINATION SHOULD BE THE MAJOR EMPHASIS OF PL 93-638. FOR ANY TRIBE TO HOPE TO ACHIEVE ANY PROGRESS TOWARD SELF DETERMINATION, IT MUST HAVE SOME CONTROL OF ITS FINANCES. THE PRESENT PROCEDURES FOR RECOVERY OF INDIRECT COSTS FROM CONTRACTS PLACES THE CONTROL OF TRIBAL FINANCES IN THE HANDS OF FEDERAL PROGRAM OFFICERS AND THE OFFICE OF THE INSPECTOR GENERAL, SINCE THEY DETERMINE IF TRIBES WILL RECEIVE INDIRECT COST FUNDS AND HOW MUCH. THE INSPECTOR GENERAL THEN ISSUES AN AGREEMENT, WHICH IF THE TRIBE SIGNS IT, PLACES ON THE TRIBE THE RESPONSIBILITY FOR MEETING THOSE QUOTAS FOR INDIRECT COST FUND RECOVERY THAT FEDERAL AGENCIES FAIL TO MEET.

FURTHER, THE TIMING OF THE AWARD OF THE INDIRECT COST RATE WELL AFTER THE START OF THE FISCAL YEAR AND WELL AFTER THE TRIBES GENERAL ACCOUNT BUDGET HAS BEEN FINALIZED, FORCES THE TRIBES TO REDO THEIR BUDGET WELL INTO THE BUDGET YEAR.

THE PROCESS WOULD BE A WORKABLE ONE FOR TRIBES, IF FUNDING WITH LEGISLATIVE RESTRICTIONS ON THE USE OF ADMINISTRATIVE OR INDIRECT COSTS WAS REMOVED FROM THE DIRECT COST BASE USED FOR CALCULATING OVER RECOVERY.

LEGISLATIVE RECOMMENDATIONS

1. CONGRESS SHOULD DEFINE CONTRACT SUPPORT AS BEING INDIRECT COSTS AND DEFINE INDIRECT COSTS TO MEAN "THOSE COSTS WHICH DERIVE FROM APPLYING THE TRIBE'S COST RATE, AS APPROVED BY THE COGNIZANT AGENCY, TO THE DIRECT COST BASE.

2. CONGRESS SHOULD "DIRECT THE BIA AND IHS TO FULLY FUND TRIBAL INDIRECT COSTS FOR PL 93-638 CONTRACTS AND GRANTS, IN ADDITION TO THE DIRECT COST BASE."

3. CONGRESS SHOULD DIRECT THE BIA AND IHS TO INCLUDE ACCURATE ANNUAL ACCOUNTING OF THE AMOUNTS OF FUNDS NEEDED TO FUND TRIBAL INDIRECT COSTS FOR PL 93-638 CONTRACTS AND GRANTS, AS A SUBACTIVITY OF EACH ACTIVITY IN THE ANNUAL BUDGET JUSTIFICATIONS TO CONGRESS.

4. ANY SHORT FALL IN INDIRECT COST APPROPRIATIONS SHALL BE TAKEN FROM BIA GENERAL ADMINISTRATION AND FROM IHS "DIRECT OPERATIONS."

5. THE DEPARTMENT OF THE INTERIOR OFFICE OF THE INSPECTOR GENERAL SHALL NOT INCLUDE IN THE DIRECT COST BASE, FOR PURPOSES OF CALCULATING OVER RECOVERY, FUNDING THAT IS RESTRICTED IN USE FOR ADMINISTRATIVE OR INDIRECT COSTS RECOVERY.

PREPARED
STATEMENT
OF
ROY HUHNDORF
ON BEHALF OF
COOK INLET REGION, INC.
RE: The Indian
Self-Determination Act

Mr. Chairman and members of the Committee, my name is Roy Huhndorf. I serve as President of Cook Inlet Region, Inc.(CIRI) and am presenting the following testimony on behalf of CIRI.

CIRI is an Indian tribe as defined in the Indian Self-Determination Act, and in that capacity, through its designated tribal organizations, has engaged in contracting with BIA and IHS for nine years.

On February 24, 1987, Chairman Udall introduced in the House of Representatives H.R. 1223, the Indian Self-Determination Act Amendments. Section 3 of H.R. 1223 amends Section 4 of ISDA (USC Section 450b (c)). This amendment as proposed in H.R. 1223 would adversely affect BIA and IHS contracting with Indian tribes in Alaska. I urge the Committee to make no changes to Section 4 that would adversely affect Alaskan tribes.

CIRI generally supports the provisions of H.R. 1223 as introduced in the House of Representatives. Section 3 of H.R. 1223, however, will effectively destroy the ability of Alaska tribes to contract under the ISDA. Section 3, which amends Section 4 of ISDA, is the provision I will address.

A. Background

To explain the significance of Section 3 as proposed in H.R. 1223 to Alaska tribes, I would briefly like to outline how the ISDA is administered in Alaska. In Alaska, several Indian tribes (as defined in and recognized under the ISDA) may exist in a given geographical area. Unlike the Lower 48 tribes, many of which have reservations defining their boundaries, most Alaska Natives do not live on Indian land. In addition, Alaska Natives generally belong to their ancestral tribe, frequently centered in one village, and to one or two statutorily created tribes. The latter tribes were organized under the Alaska Native Claims Settlement Act of 1971 ("ANCSA") as corporations. ANCSA tribes include village corporations and regional corporations. After ANCSA was passed, each Alaska native living at the time ANCSA was passed (1971) became a shareholder of a regional corporation, and if eligible, also became a shareholder of an ANCSA village corporation. Village corporations overlap, in terms of membership, with what were existing village-based tribes. A regional corporation, as the name indicates, encompasses a broader geographical area and its shareholders include members or shareholders from several village tribes and village corporations. Several tribes therefore exist for any specified area of Alaska, and an Alaska native can be a member, simultaneously, of more than one tribe.

Under the ISDA, an Indian tribe has the right, either directly or indirectly through a tribal organization, to contract with IHS and BIA. In Alaska, the contracting process would be inefficient to the point of being economically impossible if every tribe were able to contract on behalf of its members. As a result, since the ISDA was enacted, in Alaska its availability has been limited to one tribe for each area. BIA and IHS have established a "priority list" to determine which tribe is the ISDA contracting party for an area. First priority is given to an Indian Reorganization Act Council which provides governmental functions for a village, second priority to traditional village councils, then to ANCSA village corporations and finally in the absence of any of the other three, to the regional corporation for the area. The ISDA contracting tribe in an area is entitled to contract directly or through a tribal organization. Regardless of how an Alaskan tribe contracts, the IHS and BIA have not required the tribe to obtain approvals of other tribes in the area in order to receive a contract under the ISDA.

B. The Effect of H.R. 1223, Section 3

Section 3 of H. R. 1223, when considered against the background I have just set forth, would radically change the way the ISDA has been administered and in Alaska, could result in ISDA benefits being denied to most tribes. Section 3 adds a proviso to the definition of tribal organization and states that:

> "in areas where the Indian Health Service has no direct care facilities and the tribes are served by a tribal organization, such tribal organization shall be eligible to receive a contract under the authority of the Act if it has the approval of each tribe it proposes to serve."

House Report No. 99-761, which accompanied H.R. 4174 last year, described a similar provision in H.R. 4174 as follows:

> The proviso is intended to allow a tribal organization servicing a defined area to be issued a self-determination contract even if it does not have the consent of all of the tribes in the area. Under the proviso, the contract would only be issued to serve the tribes which have given their consent and the Agency would be required to provide

> services to the nonconsenting tribes by issuing a contract under the Buy-Indian Act or otherwise.

(H. Rep. No. 99-761 p.5)

The proposed change effected by Section 3 of the bill would thus require, apparently, that every tribe in a territory agree on the tribal organization for ISDA contracting. A regional corporation, for example, would be able to influence the contract awards for every village and village corporation in its region. This will create an unnecessary tension among tribes in Alaska, which have to date successfully contracted under ISDA.

In addition, the full impact of the proposed amendment is unclear and this introduces significant problems for future ISDA contracting in Alaska. Where several tribes exist and they disagree as to which tribal organization should provide services, the tribal organization would receive a contract enabling it to serve only the tribes which have given their consent. Where one Native belongs to a traditional village council, a village corporation and a regional corporation, and each of these three entities designates a different tribal organization, which tribal organization will be entitled to contract for services provided to the Native? Also unclear is when a tribal organization will be deemed to "serve" a tribe. If it offers benefits to one member of a tribe, must it get that tribe's permission? In an urban area, such as Anchorage, there are members of hundreds of different tribes, including some from the Lower 48. Must all of those tribes consent if CIRI, as a contracting party offers dental services to all Natives in Anchorage (as it does now)? In the Alaskan situation, where every area contains multiple tribes and most Natives are members of more than one tribe, the amendment will create an administrative obstacle that may well prove insurmountable for a contracting tribe. At the very least, Section 3 of H.R. 1223 will result in the wasteful expenditure of time and other resources to overcome barriers to contracting.

The negative aspects of Section 3 are not balanced by any positive results for Alaska tribes. The ISDA has worked for Alaska native communities for over ten years. We support the current bill to the extent it tries to improve the ISDA. As currently written, however, Section 3 would drastically undermine the ability of Alaska tribes to benefit from the Act.

CIRI would urge that Section 3 of the H.R. 1223, if incorporated into a Senate bill, be amended so that it will not apply to Alaska tribes.

Thank you for your time and for the consideration we know will be given to these remarks. I would be happy to answer any questions the Committee may have.

PREPARED STATEMENT OF ZANE JACKSON, CHAIRMAN THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON

On behalf of the Tribal Council of the Confederated Tribes of the Warm Springs Reservation of Oregon, I want to express appreciation for your holding hearings on The Self Determination Act. We view the Self Determination Act as a good law and feel that many good and positive advancements have been made by Indian Tribes since its passage in 1975.

We believe in strong and stable Tribal Governments which are not only able to successfully operate Federal programs but which can also develop their own economies and less dependence on the Federal government.

We believe that many of the improvements sought by the act for Indian Tribes have not yet been achieved because many Federal employees still have not embraced the notion of removing the Federal domination of Indian programs. We believe that many of the actions of the current administration, particularly in the BIA, clearly show that Federal employees high in the bureaucracy, and far away from where Federal services to Indians are actually provided, still feel that they know more than Tribal Councils about the needs of Indian people. This is perhaps most clearly shown by the continued removal of programs from the Indian Priority System, after Tribal Councils have been asked to establish their priorities; and by the constant barrage of initiatives from the office of the Assistant Secretary for Indian Affairs which have required our constant attention over the past year. While these are not the only problems, they are examples which point to the need to strengthen the Self Determination Act in such a way that blatant disregard for its spirit and intent would not be permitted.

The Confederated Tribes of the Warm Springs Reservation have a relationship with the United States Government which was established by treaty in 1855. (12 Stat. 983)

In 1938, the Warm Springs people chose to organize under the Indian Reorganization Act. A Constitution was adopted along with a Corporate Charter under which our form of tribal self government was established. The trust relationship of the Federal Government was not reduced by the adoption of these documents. In fact, some of the specific responsibility maintained by the United States Government was contained within those documents.

The Indian Reorganization Act is an historic enableing Act. It permits Tribes, if they so choose, to select a certain form of government organization. But the option is the Tribes! **We believe that Congress meant the Self Determination Act to work the same way.** Each individual Tribe may choose the extent to which it will participate by taking over the operation of federal programs based on the Tribes' own judgement as to what is best for its people.

We believe that much of the success of our Tribe in developing an economic base and in maintaining a stable tribal government can be attributed to our elders, who recognized the continuing obligations of the United States and need for federal assistance to ensure that our governing body operated properly within the provisions of our Constitution and By-Laws and our Corporate Charter.

Within those documents, the United Staes retained and accepted certain reponsibilities which clarify the basis of our Government to Government relationship as well as our trust relationship.

Our Treaty and these other documents form a unique relationship between our Tribe and The United States. That relationship is not the same or held in common with any other Tribe or Native American group.

The Self Determination Act was intended to remove obstacles from Tribes who wished to take over and operate programs being provided by the Federal government, for the benefit of their Tribes. In 1975, the Act was designed to confirm the right of Tribes to contract for the operation of such programs because many Tribes were complaining that Federal Agencies and employees were putting roadblocks in their way.

That Act did not change the unique relationships of the United States Government and individual Tribes. In fact, the Act made little direct reference to those unique relationships. The lack of such references allows the federal agencies to lump the entire Indian program into a common package and assume that what is good for one tribe is good for all tribes.

Because of the lack of acknowledgement of our relationship, the treaties and other laws, and for other reasons, our elders feared that Public Law 93-638 would be utilized as a method by which the United States would withdraw from its' responsibility to our Tribe, and advised caution in accepting contracts under the Act.

Unfortunately, our experience in contracting under the Act has proved them right. **Programs contracted under the Act have been consistently phased out through the budget process,** frequently by people in the administration who have no knowledge of the relationship of our Tribe to the Federal government.

Programs operated on our reservation which have a direct relationship to federal responsibility to our Tribe are unilaterally reduced, lumped together with other programs or removed altogether from the federal budget, without consultation.

While the Self Determination Act was designed to acknowledge Tribes' right to contract, it has been used as an excuse by the Administration to pressure Tribes to contract.

We fail to see any incentive to take over and operate programs which are seriouly deficient in funding, or when once contracted the United States fails to recognize or pay total costs in parity with the Federal government's operations of the program. In response to the concern about the United States paying total contract costs, some respond that BIA and IHS can not be effective as operating agencies and as contracting agencies at the same time. We do not agree. **The failure of both agencies to pay total contract costs, as required by the Act, is simply related to inadequate budget requests and providing either inaccurate or inadequate information to the Congress.**

The Law needs to permit maximum participation to Tribes in operation of Federal programs, **even without contracting**. In the area of forestry, our tribe has worked hand in hand with the BIA to improve the BIA forestry program. To ensure that program continuity and efficiency exists, our Tribe places our tribal forestry program under the direct supervision of the BIA Forest Manager. This avoids any duplication of effort and permits tribal and federal resources to be utilized to provide the greatest benefit. It is our choice not to contract for forestry, but we believe that the manner in which we participate in the forestry effort is an excellent example of self determination without contracting.

As we've participated, we've noted many obstacles to the efficient operation of federal programs. These obstacles do not result from the BIA being both a contracting and operating entity. Rather, it is a personnel system in BIA which reclassifies and downgrades key positions without tribal input. It is hiring freezes which keeps key federal positions vacant. The manner in which Indian Preference is applied prevents quality non-indian employees from seeking careers in BIA and IHS. Travel ceilings and limits on vehicles which don not consider the types of services being rendered cause problems.

Frustration with these kinds of problems in the federal programs has led many tribes to contract before they were ready. The result is that many are now in debt to the United States Government for dissallowed costs due to either poor or lost records.

Good and sound BIA programs, like forestry, come under attack year after year in the Administrations budget process, despite very clear communication from the Congress of its' intent.

If it is the intent of Congress that the Self Determination Act is to provide for tribes to have "effective and meaningfull participation....in the planning, conduct and administration". . . of programs provided for the benefit of Indians, then the Self Determination Act must be more than a contracting law. The administration of the law must provide that contracting is optional and to be accomplished based on the tribes schedule. It must also provide that tribes be afforded maximum participation in non-contracted programs and their design.

Expression of tribal priorities must be respected in the budget development. **If tribes are to develop strong and stable government, then stable funding is a must.** The constant tampering with funding, as has been so apparent in this administration, is counter productive to the development of strong tribal governments.

A new role for the BIA and IHS must be mandated. The role that the administration plays in this relationship must change. Clearly the law intended that the paternalistic and dominating role of the Federal government be changed, yet Federal employees, including many who seemingly have no policy making authority, make decisions which have massive impact on Indian country, without Tribes having any recourse but to pursue Congressional intervention. The "De-grandfathering" of indirect cost allocations and the related flat administrative fee proposal, the removal of programs from the Indian Priority Systems and numerous recent innitiatives in the BIA as well as others in the IHS are but examples.

Initiatives must belong equally to tribes and have their full participation in development. Consultation, must be on the basis of a true government to government relationship, where a two way dialogue occurs which permits effective examination of issues and consideration of the needs of both the Tribes and the Federal government, before initiatives are proposed or decisions made. We see just the opposite occurring in this administration, which is counter to the spirit and intent of the law. Certainly the law must be strengthened to prevent this in the future.

We are very proud that our Tribe is often held up as an example of progress and development. We believe this is due to the wisdom shown by our elders and our leaders over time. One thing that they have never waivered from is that the trust relationship is part of our bargain with the United States and must be maintained. But, we have learned something that many others, both Indian and non-Indian, have not learned. The BIA and other Federal agencies cannot do things for Tribes. What they can and must do is to assist Tribes in doing for themselves. That is the spirit and practice of self determination.

We recognize our role and responsibility to work with the Administration and the Congress to continue the development of strong tribal governments and furtherence of meaningful self determination of Indian tribes, which includes full recognition of our unique government to government and trust relationship. We offer and commit our full participation to that effort.

In summary, we recommend that amendments to strengthen the Indian Self Determination Act include the following provisions. The law should provide;

1. More and better recognition of the unique continuing relationship of each tribe to the Federal Government, and as stated in the Presidents policy "reaffirm dealing with the Indian Tribes on a government to government basis and to pursue the policy of self government for Indian Tribes without threatening termination.

2. Maximum opportunity for Tribes to participate in the "planning, conduct and administration" of programs operated for the benefit of their people, **whether they contract or choose not to contract**.

3. **Effective consultation** on the basis of a true government to government relationship. Effective consultation must mean that the parties work together and have full input and effect on decisions.

4. Funding allocations, when a Tribe contracts, which include an allocation of funds at least equal to what the government would have spent and which consider in making a determination of such allocation both direct and indirect costs of the Federal government in operating such programs. The goal of the allocation should be that the services provided by the contract are at least equal with those provided by the government.

5. Funding allocations, at the Tribal level which are protected by a "recurring base" approach and which are subject to levels of appropriations by Congress, not administrative decisions. Further, Tribes should be permitted to set priorities and adjust between programs within their base, without fear of tampering, such as program removal or program targeting. (The **Indian Priority System** in the BIA and the **Resource Allocation Methodology** in the IHS could be refined to accomplish this, if honored and improved upon.)

6. A new form of contract which clearly represents the unique nature of contracts under the Act and is absent the "procurement" aspects of the current contracts.

Once again, we appreciate the support of your committee and the opportunity to address this very important matter.

PREPARED STATEMENT OF CARL R. McKAY, TRIBAL CHAIRMAN, DEVILS LAKE SIOUX TRIBE FORT TOTTEN, ND

The Devils Lake Sioux Tribe located on the Devils Lake Sioux Indian Reservation (Fort Totten) in North Dakota is pleased to have this opportunity to participate in the Senate Select Committee's hearings on the proposed amendments to the Indian Self-Determination Act. The amendments are of particular interest to the Devils Lake Sioux Tribe because the Tribe is the majority owner of a manufacturing facility, the Devils Lake Sioux Manufacturing Corporation, and the sole owner of another recently formed manufacturing facility, Dakota Tribal Industries. The proposed amendments can greatly assist the Devils Lake Sioux Tribe in insuring that tribal members who want to stay on their own reservation with their own people will have the opportunity to do that coupled with the opportunity to be employed in meaningful work at a fair wage.

Prior to the establishment of the Devils Lake Sioux Manufacturing Corporation, there was little meaningful employment for Native Americans on the Devils Lake Sioux Reservation. As a result of a joint venture with the Brunswick Corporation and the Tribe, a new enterprise was formed that provided the first real job base for Native Americans. The North Dakota Congressional delegation was present and working for this novel creation. Senator Quentin N. Burdick and the late Senator Milton Young were instrumental in using their good offices in bringing together the creative talents of a large business enterprise, the Brunswick Corporation, and an impoverished Indian Tribe located on the great plains in North Dakota. The fact that this joint venture has become a blueprint which other Indian Tribes wish to emulate is a testimonial to the wisdom of the effort. Senator Burdick has worked hard on the problems the Devils Lake Sioux Tribe now faces in order to protect the economic security of the Tribe and its members.

During my tenure as Chairman of the Devils Lake Sioux Tribe, I have frequently met with members of Congress to outline the problems faced by our enterprise, the Devils Lake Sioux Manufacturing Corporation. The present problems primarily center on the contracting process. How can we insure that we will have the contracts to keep our people employed. We have this problem even though we can produce our products on time and within the specifications demanded. I have lamented on several occasions to Senator Burdick that it seemed to me that the federal government had a much greater priority to keep federal prisoners working than to creatively provide real economic opportunity to tribal members on their own reservations. The proposed amendments have the right policy thrust to correct this misplaced priority.

I do have some reservations regarding some of the specific language contained in the proposed amendments which I will set out below. The Devils Lake Sioux Tribe does endorse the general thrust of the amendments and commends the Senate Select Committee on Indian Affairs for having the courage to take up the important task of providing economic opportunity to Native Americans on their home reservations.

The Devils Lake Sioux Tribe, in 1973, entered into an agreement with the Brunswick Corporation for the formation of a manufacturing company, the Devils Lake Sioux Manufacturing Corporation. At the time of formation, the ownership of the Devils Lake Sioux Manufacturing Corporation (hereinafter DLSMC) was: the Devils Lake Sioux Tribe thirty percent (30%); Brunswick seventy percent (70%). To assure the Tribe the right to acquire additional ownership and control of DLSMC, the Tribe and Brunswick entered into a "Divestiture Agreement" guaranteeing the Tribe the option to purchase Brunswick's share of DLSMC. Today, the Tribe owns fifty-one percent (51%) and Brunswick owns forty-nine (49%) of DLSMC. Control of DLSMC within the Board of Directors now rests with the Tribe.

Because the Devils Lake Sioux Reservation area did not have adequately trained personnel to operate the manufacturing firm, the Tribe entered into a "Management and Consulting Agreement" with Brunswick to insure that DLSMC had the necessary technical disciplines required. Brunswick assisted the Tribe in obtaining the necessary financing for the erection of the manufacturing facilities and to purchase materials to begin production.

DLSMC's story of success can be attributed to several factors which I will try to outline: (1) a dedicated workforce willing to work; (2) concerned owners, both the Tribe and Brunswick, which worked together to insure that the business succeeded; (3) participation in the Small Business Administration's 8(a) set aside program; and

(4) the continuous support of Congress in demanding that the government improve its contracting with Indian owned/controlled firms. The North Dakota Congressional delegation, and in particular Senator Burdick, has worked hard to open doors of economic opportunity which otherwise would have been shut throughout the federal system. Through the 8(a) set aside program, DLSMC received contracts for long running, high volume production requirements. DLSMC's continued success is threatened in the future as DLSMC has, in 1986, graduated from the 8(a) program and must compete with major corporations on future contracts. Equally important, DLSMC may very well be excluded from competing for one of its major products, the PASGT Helmet, due to the statutory rights currently exercised by the Federal Prison Industries.

The Devils Lake Sioux Tribe has received many benefits from the operation of DLSMC. In 1986, DLSMC provided employment opportunities for 357 Native Americans. The employment opportunities are not just limited to those at DLSMC but include the start up of small businesses to provide the services required by DLSMC, i.e. grounds maintenance, janitorial services and security services. The dividends earned by the Tribe from DLSMC have enabled the Tribe to continue to fund Tribal programs which have been cut back in recent years. During the last thirteen (13) years, the Tribe has received in excess of $5.4 million in dividend distributions. Finally, because of DLSMC's blueprint for success, the Tribe has started another manufacturing facility, Dakota Tribal Industries (DTI), to draw on the experience and resources of DLSMC.

Dakota Tribal Industries (hereinafter DTI) is a tribally chartered corporation, 100% owned by the Tribe. DTI is also a manufacturing facility, but, it will be competing for contracts in areas unrelated to the activities of DLSMC. It is anticipated that DTI will employ approximately 100 people, the large majority if which will be Native American. The Tribe is counting upon the fact that it has in DLSMC, the expertise and the resources to make DTI a successful counterpart to DLSMC.

The proposed legislation found in the new section 7(d) to the Indian Self-Determination Act has the basic ingredients to promote economic development on Indian Reservations. The establishment of a Committee for Purchases from Tribally-owned Enterprises is a practical, business approach to getting real economic activity going and most importantly, staying, on the reservation. Without the assurance that, if Indian owned business produce a good product at a fair price which the government needs, then the government will act to provide a contract for these goods, then no long term economic stability can follow. This is particularily true out on the great plains in North Dakota. The Federal Government must act to meet its "trust responsibility" to assist Tribes in giving their members an opportunity to have meaningful employment on their native reservations.

We know that there are individuals equiped to serve on the Committee for Purchases who can insure that Tribally owned enterprises have the ability to perform and work to provide the matching contract to allow the Tribally owned business to get to work. The Tribe sees such individuals as the General Manager/Vice-President of DLSMC as available as an individual who has worked for fourteen years in "Indian Country" setting up a successful firm and helping others to start. Mr. B.J. Richmond is an excellent example of the kind of people who are available to serve upon the Committee and give it the experience necessary to make the process work. The Tribe is willing to allow Mr. Richmond ample time to work with whatever individuals the Senate Select Committee desires to insure that the process outlined in the proposed new Section 7(d) is successful.

The process set forth in 7(d)2 Procurement is a practical method which can work. The Devils Lake Sioux Tribe does not believe that the Federal Prison Industries program should have precedence over procurement from Tribally owned enterprises. The Tribe does not disagree with the continued precedence which the blind and severely handicapped enjoy as this is a sensible public policy. The Tribe believes that Congress should set its priorities straight and recognize that Tribally owned enterprise should compete on the same basis with the Federal Prison Industries program.

The dollar amount of contracts that a tribe may receive for all its tribally-owned enterprises contained in 7(d)2(3) is overly restrictive particularly during the time period where the $3 billion committed to the program is not fully used. The Devils Lake Sioux Tribe recommends that such a formula should only be used after full commitment of the $3 billion has been attained.

No restrictions other than the Tribally-owned requirement should apply since as long as a Tribally-owned enterprise can meet the requirements under the Act; then the purposes of the Act are being satisfied and employment is being generated on and around Indian Reservations.

The requirements set out in 7(d)2(6) Definitions are overly restrictive particularly when compared to the 7(c) definitions. The Devils Lake Sioux Tribe believes that a qualified Tribally-owned enterprise should be one defined as one that is no less than fify-one percent (51%) owned by a federally recognized tribe or Alaska Native Regional Corporation, is located within the exterior boundaries of that Tribe's reservation or Region and whose workforce is at least sixty percent (60%) Indian. This definition is sound and allows for the employment of a non-Indian minority to meet workforce needs which may not be readily supplied by the Indian community.

In summary, the Devils Lake Sioux Tribe supports the principal policy thrusts of the proposed amendments 7(c) and a new 7(d) to the Indian Self Determination Act. There is an immediate need nation wide to create permanent jobs on Indian reservations. This proposal is the first real attempt to address the problem of unemployment on Indian reservations. It can work and if it is intelligently administrated, it can become a centerpiece of a national Indian policy which really does attempt to meet the Federal Government's responsibility to help Native Americans to remain on their homelands and have productive lives.

Prepared Statement

On behalf of

Standing Rock Sioux Tribe,
North and South Dakota

Assiniboine and Sioux Tribes
of the Fort Peck Reservation, Montana

Seneca Nation, New York

Yukon-Kuskokwim Health Corporation

Kodiak Area Native Association

Aleutian/Pribilof Islands Association

Bristol Bay Native Association

and the

Association of Regional Health Directors, Alaska

Prepared by

Sonosky, Chambers & Sachse
Washington, D.C.

We submit this testimony on behalf of the Standing Rock Sioux Tribe, the Assiniboine and Sioux Tribes of the Fort Peck Reservation, the Seneca Nation, the Yukon-Kuskokwim Health Corporation, the Kodiak Area Native Association, the Aleutian/Pribilof Island Association, the Bristol Bay Native Association, and the Association of Regional Health Directors of Alaska. These tribes and tribal organizations appreciate the opportunity to submit testimony on P.L. 93-638, the Indian Self-Determination and Education Assistance Act. They request that these comments be added to the record of the hearing held on April 22, 1987.

The tribes and tribal organizations presenting this testimony are located in the East, the Great Plains, and Alaska. They have contracts and grants with both the Department of the Interior and the Department of HHS, some of which are of modest size and some of which involve over $6 million. Two members of the Association of Regional Health Directors have contracts in excess of $11 million. These contractors have a broad range of experience and points of view. Nevertheless, they have experienced many of the same problems in the 638 contract process, and are thus able to speak with a common voice on several important issues.

P.L. 93-638 gave tribes and tribal organizations the opportunity to take charge of many federal programs that benefit Indians and Alaska Natives. The Act has expanded the role of tribal governments and given Indians and Alaska Natives a stronger voice in health, education, social services, law enforcement, natural resources, and other programs. Among tribes, P.L. 93-638 is one of the best-known and widely supported federal laws ever enacted.

At the same time, tribes and tribal organizations have experienced tremendous frustrations with the 638 process. They receive insufficient funds to operate contracted programs. They are not permitted to contract for some programs at all. They are burdened with excessive paperwork and agency oversight. Minor contract modifications, virtually every purchase of equipment, and most leases and subcontracts require agency approval. Federal procurement regulations designed for an entirely different sort of contract are indiscriminately applied to them. The process of self-determination has become a complex and often adversarial exercise in bureaucracy.

The contractors represented here commend this Committee for its decision to take on these complicated problems. In this testimony, the contractors identify some of the most troublesome problems and also suggest solutions.

I. Agency refusal to contract for particular programs and to provide information on funds available for programs.

In the Self-Determination Act, Congress established a broad policy favoring tribal assumption of programs and functions formerly undertaken by the federal government. Unfortunately, both BIA and IHS have violated the Act by arbitrarily excluding certain activities from the self-determination process -- claiming that those activities cannot be contracted by tribes.

For the tribal contractors represented here, the programs for which agencies have refused to contract have been in several categories: (1) activities performed by the Area Office; (2) "administrative" portions of programs; (3) activities that the agency claims are part of its trust responsibility; (4) activities that do not belong in any of the usual "uncontractable" categories but which the agency has arbitrarily decided are not subject to contract.

A few examples will give an idea of the magnitude of the problem. IHS frequently refuses to contract for Area Office functions. This has led to absurd results, such as in the sanitarian program in Alaska. IHS has refused to allow the Yukon-Kuskokwim Health Corporation and other regional health corporations to administer this program, which improves water and sewer systems in Alaska Native villages, on the ground that sanitarians are based directly in the Area Office. As the health corporations have assumed a greater share of the IHS responsibilities in Alaska, they have also absorbed a number of sanitarian functions. They have done so by spreading the cost over other programs and without the benefit of contract funding from IHS for this program. At the same time, IHS sanitarians in the Area Office have become almost completely idle and are only called upon during spring flood emergencies.

In the education area, the BIA steadfastly refuses to contract for administrative functions. For example, it has refused to permit the Standing Rock Sioux Tribe to contract for the administrative portion of higher education grants, which impairs the Tribe's ability to perform its contract effectively.

On occasion, Interior or HHS will simply decide that they do not want to enter into any more contracts for a particular activity. For example, the BIA in the past has contracted with tribes for law enforcement investigation. It recently announced that it planned to implement extensive improvements in its investigation system. When the Standing Rock Sioux Tribe sought a contract for law enforcement investigation, the BIA refused, citing its planned improvements in its own system. This refusal had no basis in law, carried the insulting and unfounded implication that a tribe would be unable to handle a truly high-quality program, and was particularly outrageous given the BIA's long history of a woefully inadequate system of investigation at Standing Rock.

Alaska regional health corporations have repeatedly requested 638 contracts to bill third parties for services rendered by the corporations themselves and by IHS. In general, they have been refused. The contractors believe, with considerable justification, that collections would be greatly increased if the health corporations were permitted to handle them.

For example, the Yukon-Kuskokwim Health Corporation reports many inadequacies in the IHS system for billing third parties at the Bethel Service Unit. IHS has not included all Medicaid-eligible patients in their billing system, and therefore no bills for these patients are submitted at all. Also, the Area Office does not follow up on rejected claims, although it is well known that many claims are improperly rejected. YKHC estimates that collections at the service unit could be tripled if the system were improved. IHS has permitted YKHC to bill for services that are provided in the field rather than at the federal facility in Bethel, and YKHC has shown itself to be an efficient collector. In spite of all this, however, IHS refuses to permit YKHC to bill for all services provided in its region.

The area of trust functions is particularly troublesome. Under the Act, the agencies cannot enter 638 contracts which would "impair [the agency's] ability to discharge [its] trust responsibilities to any Indian tribe or individuals." 25 U.S.C. 450j(f). The Act does not state that no activities that are part of the trust responsibility could be contracted, and in fact the BIA regulations specifically acknowledge that many such functions are contractable. (See 25 CFR 271.12(b) and 271.31 - 271.34.) However, the BIA uses the trust responsibility as an excuse for failing to enter into contracts in an arbitrary and incoherent way. It has never specified exactly which functions cannot be contracted on this basis, and therefore can use the trust responsibility "excuse" virtually at will.

Congress should amend P.L. 913-638 to make it absolutely clear that agency programs or portions thereof can be contracted without regard to the office or level of the agency that handles the program. Either legislative or report language should direct the agencies to contract for administrative functions wherever feasible, including in education programs, and for billing third parties for IHS services. And finally, Congress should specify which trust functions cannot be contracted. The list should be as precise and as limited as possible. Any other trust functions should be contractable as long as there are no declination issues under 25 U.S.C.450f(a) or 450g(a).

In order to determine whether it would be feasible for them to enter a contract for a particular program, tribal contractors sometimes request information from the agencies concerning the amount of funds expended for that program. If the agency does not wish to contract the program, it simply refuses to provide the information on funds. This has happened, for example, with the village-built clinic program in Alaska. This is intolerable, and Congress should amend P.L.93-638 to clarify that the agencies must provide funding information upon request.

II. Funding issues

A. Contract support and indirect costs

In P.L.93-638, Congress intended tribes to operate programs formerly provided by the federal government with no reduction in the level of services. To do this, tribal contractors must receive not just the direct program dollars, but also the administrative and overhead funds necessary to operate the program. For this reason, the 638 process has included funds for "contract support". Contract support funds have been provided to tribal contractors through the mechanism of an indirect cost rate.

The current indirect cost system is severely flawed. The problems can be divided into four basic categories. First, the agencies do not request sufficient funds for indirect costs, nor do they provide Congress with the information it needs to appropriate enough funds. For example, for several years the BIA froze its budget request for contract support at the FY 1984 level. This meant that there were insufficient funds for new or expanded tribal contracts or for increases in the indirect costs for existing contracts. When the BIA was absolutely forced to come up with additional funds, it "borrowed" them from self-determination grants. At IHS, there is not even a line item for contract support, and it is virtually impossible for Congress to determine how much would be needed to adequately fund indirect costs.

Second, there are problems with the procedures for determining indirect cost rates. For example, the Inspector General may determine that certain programs should be included in the indirect cost base, but the funding agencies refuse to pay indirect costs for some of these programs. There are no clearly articulated standards, and the differing interpretations of the Inspector General and funding agencies have severe economic impact on tribal contractors. To make matters worse, there is no mechanism for contractors to appeal agency determinations regarding indirect costs.

Third, the agencies refuse to pay indirect costs at all for some programs. Probably the best known example of this are the "pass-through" programs at the BIA -- for example, general assistance. The Kodiak Area Native Association in Alaska reports that the BIA refuses to pay indirect costs for its Housing

Improvement Program (HIP). Contractors of course incur substantial administrative costs for these programs, so the BIA's refusal to pay these costs is irrational, as well as illegal.

At IHS a slightly different situation arises. With some programs, e.g., the dental program, IHS technically permits contractors to recover indirect costs, but in fact those costs come from the direct cost base of other programs. This, of course, robs those programs of needed direct dollars.

Fourth, there is the problem of underrecovery of indirect costs. Once the contractor's indirect cost rate is set, the contractor is responsible for recovering the full rate for every grant or contract it has. This is simply impossible. Some agencies -- including the BIA and the IHS themselves on some occasions -- take the position that they cannot, or will not, provide the contractors with their full indirect cost rates. The reasons given include claims of legislative or regulatory prohibitions, fiscal constraints, and others.

The result is a nightmare for tribal contractors. Each time an agency refuses to provide a tribe with its full indirect costs, the contractor is faced with insufficient funds to administer its programs. The tribe must either cut back its administrative capability (and thus undermine its ability to run the programs), cut into direct services, or make up the costs from the contractor's own limited -- and already overextended -- resources.

Beyond this, tribes are penalized when the agencies fail to provide the full indirect costs. When a contractor does not recover the full amount, the Inspector General determines that the tribe has "underrecovered." The tribe can pay back the amount of this underrecovery -- in other words, pay the government money that the tribe needed to run programs but never received. Or, the contractor can be penalized in subsequent years. This means that in computing the next year's indirect cost rate the Inspector General will carry forward the full amount of indirect costs, including amounts the tribe should have -- but did not -- receive. By means of this fiction, called a "theoretical overrecovery" , the contractor's indirect costs for the next year are reduced by the amount not recovered.

We suggest the following solutions to these problems. First, Congress should require the Departments of Interior and HHS to include a properly documented request for contract support in its annual budget request to Congress. The amount requested should be based on the amount that would have been necessary to fund all 638 contracts at 100 percent of their indirect cost rates for the previous year, plus an additional amount for anticipated new contracts. These agencies should also be required to furnish Congress with a mid-year report on indirect costs, identifying any projected shortfall.

Second, we suggest that the agencies be required to work with the Inspector General to develop written procedures for determination of indirect cost rates. These procedures should include clear guidelines on troublesome issues such as the programs that must be included in the base for indirect costs. They should also require that the negotiation process for indirect costs be properly coordinated with the contract cycle. And finally, the procedures should permit appeals from agencies' determinations regarding indirect costs -- for example, an agency's refusal to pay indirect costs for a certain program, or the full rate for a particular program.

Third, the Self-Determination Act should be amended to provide that whenever contract support funds are provided through the mechanism of an indirect cost rate, Interior and HHS must pay the full indirect cost rate on all programs to which such costs are attributable. The Committee should include strong report language requiring these agencies to pay costs on such programs as general assistance, HIP, and the IHS dental program.

The Act should also be amended to require that the full indirect cost rate be paid not just for BIA and IHS programs, but for all federal programs. This should at least be done for programs within the Select Committee's jurisdiction -- for example, the Indian education programs at the Department of Education and the ANA program at HHS. And just as important, the Act should be amended to prohibit tribal contractors from being penalized when they cannot recover the full indirect cost rate from any agency on any program.

B. Coverage of tribal contractors' employees under the Federal Tort Claims Act.

The tribal contractors represented here strongly support an amendment to P.L. 93-638 that would extend the Federal Tort Claims Act (FTCA) to employees of tribal contractors who are carrying out the federal government's health care responsibilities to Indians and Alaska Natives. We will also address the issue of FTCA coverage for employees of tribal organizations which have contracts with the Department of the Interior.

The Federal Tort Claims Act does not apply to negligence by employees of tribal contractors because they are not considered federal employees. Current IHS regulations require tribal contractors to purchase private insurance coverage, and the premiums so paid are an allowable expense under 638 contracts. No separate line item is provided for this purpose in the appropriations process. Thus, the funds that are spent for malpractice insurance are funds that otherwise would be spent directly for health services.

It will come as no surprise to the Committee that malpractice costs for tribal contractors are skyrocketing. The twelve regional health organizations in Alaska recently surveyed their insurance costs. From 1984 to 1987 the collected premiums for these organizations have increased from $293,406 to $1,314,465 -- some 448 percent! In the next fiscal year, the Alaska Regional Health Organizations estimate that the premiums will rise another 30 percent, to $1,709,252. Also, the coverage limits have been reduced by as much as one-half, and many policies no longer cover Community Health Aides -- the backbone of rural health care.

The Indian Health Service has recently undertaken its own survey of malpractice insurance costs and also of contractors' insurance claims history. Although the results of the survey are not yet final, we have been informed that it will reveal the same trend as the Alaska survey did; namely, skyrocketing costs and narrowing scope of coverage. IHS estimates that insurance costs for all tribal contractors will exceed $4 million in FY 1988.

The Alaska survey also sought information about malpractice claims asserted against the regional health providers. During the last two years, only two such claims were asserted, and neither was successful. This low claims experience is typical of every year since the twelve regional health providers have been in business. Furthermore, the nationwide survey will show a similar claims history.

Thus, covering tribal employees under the FTCA obviously makes sense from a financial point of view. Over $4 million that is now being spent for malpractice insurance could be used for health care. And, the United States would not expose itself to a large number of malpractice claims.

FTCA coverage also makes good sense from a policy point of view because it reflects the unique nature of 638 contracts. When a 638 contractor enters into a contract with IHS, IHS is not relieved of its fiduciary responsibility to provide health care to Native Americans. Unlike other contracting situations, IHS remains actively bound to see that its fiduciary responsibilities are strictly carried out by tribal contractors. And, 638 contracting is unique in that it takes place in the context of a government-to-government relationship between the United States and Native American tribes. Requiring tribes or tribal organizations to waive their soverign immunity and secure insurance coverage under these circumstances directly undermines that relationship.

We also ask the Committee to consider extending FTCA coverage to the employees who work under 638 contracts with the BIA. The liability coverage which tribal contractors must purchase is largely limited to such commonplace occurrences as motor vehicle accidents. However, on very rare occasions, there are tragic occurrences that give rise to a claim against the contractor but which the liability insurance will not cover. For example, one of the tribal contractors represented here was faced with a situation where a stove installed by one of the contractors' employees exploded and killed a member of the household. The liability insurance did not cover the loss, and the Tribe could not afford to compensate the victim's family. In situations such as these, fundamental fairness demands that the victims have recourse against the United States. We recommend that, at least for catastrophic occurrences that would not adequately be covered under typical liability insurance, FTCA coverage be extended to tribal employees under contracts with the BIA.

C. Carryover funds.

Under current law, 638 contract funds that are not expended in the year in which they were originally appropriated can be "carried over" into the succeeding fiscal year. Under the law, carryover funds should be made available to contractors on a virtually automatic basis, and agency regulations reflect this. See 25 CFR 271.55(b); 42 CFR 36.236. However, in reality the system of providing carryover funds has several deficiencies.

Some tribal contractors, for example, the Yukon-Kuskokwim Health Corporation in Alaska, complain that they are required to provide a detailed line item justification for each request for carryover funds, even where those funds are to be used for their originally contracted purpose. Furthermore, the agencies generally require that the audit for the original fiscal year must be complete before any carryover funds are provided. These factors in combination create delays of well over six months in gaining access to carryover funds. This prevents tribal contractors from planning for use of these funds on a long term basis, and contractors are forced to use these funds for short term projects that are often not those most needed by the people.

We propose an amendment to P.L. 93-638 to require that if carryover funds are to be expended in the succeeding fiscal year for the purposes for which they were originally contracted, no additional justification or documentation of these purposes need be provided by the contractor as a condition of receiving and expending the funds. The amendment should also provide that at least 80 percent of carryover funds should be available on the first day of the succeeding fiscal year, regardless of whether the audit is complete for the preceding year. The remaining 20 percent would provide a more than adequate margin for error in case the audit shows that the amount of carryover is somewhat different than originally estimated.

D. Cost of living increases under the Federal Pay Act.

Tribal contractors frequently do not receive contract increases sufficient to cover cost of living increases under the Pay Act. In some areas, contractors are apparently ignored for Pay Act purposes. In the Alaska area and possibly other areas as well, the situation is more complicated. The Area Office does not count tribal employees when it is computing the amount it would need to fund, for example, a two-percent increase under the Pay Act. It therefore does not receive enough Pay Act funds to cover the full two-percent increase. It does distribute a portion of the Pay Act funds to contractors, but the amount is less than 2 percent. Sometimes, in an effort to provide the full

2 percent increase, it makes up part of the shortfall by not filling positions that have become open during the year. This can have a negative effect on the quality of health care.

P.L. 93-638 should be amended to clarify that tribal contractors are eligible for Pay Act funds just as federally operated programs are. In report language, the Committee should instruct Interior and HHS to include tribal employees when they estimate the amount of funds they will need to cover a particular Pay Act increase.

E. Special federal COLA's for employees in Alaska.

This issue is unique to tribal contractors in Alaska. In Alaska and Hawaii, all federal employees receive a 25 percent cost-of-living-adjustment (COLA) over and above what other federal employees receive. The COLA is not taxed. When tribal organizations in Alaska assume control of an IHS or BIA program, the amount they receive to fund a particular position is the same amount the agency was paying, and thus includes the COLA. However, since employees of tribal contractors are not considered federal employees, the entire amount of their salary is subject to federal and state taxation. This means a real reduction in pay of three or four thousand dollars for federal employees who opt to continue as tribal employees. This obviously makes it more difficult for tribal contractors to retain experienced federal employees.

The law should be changed so that employees of tribal contractors are treated as federal employees for purposes of these special COLA's.

III. Excessive regulation and oversight of 638 contracts

In enacting P.L. 93-638, Congress found that prolonged federal domination of Indian service programs had damaged tribal self-government and impaired the effectiveness of the programs themselves. Congress therefore decided to permit tribes and tribal organizations to operate federal programs for the benefit of their people. The law created, or should have created, a unique government-to-government relationship with rules and procedures specially designed for that relationship.

However, tribes are often treated not as responsible governments assuming control of federal programs, but as ordinary procurement contractors who are manufacturing a product according to rigid specifications. A host of inappropriate and burdensome regulations are applied to tribal contractors, and they are not given the flexibility to modify programs as they see fit.

This is due in part to the fact that with a few exceptions, 638 contracts are subject to "all federal contracting laws and regulations." 25 U.S.C. 450j(a). Waivers can be requested, but the agencies have complete discretion to refuse them, and the application process itself is cumbersome. See 42 CFR 36.205(b)(18), 36.216; 25 CFR 271.51(b).

This exposes contractors to a bewildering variety of law and regulations. In 1983, the Department of Defense and NASA jointly published a new Federal Acquisition Regulation (FAR) codified in 48 C.F.R. Chapter 1 -- a two volume set. These regulations apply to all federal acquisitions. Individual agencies were then to promulgate their own acquisition regulations to "supplement and implement" FAR. Both the Departments of Interior and HHS have done so -- thus creating several hundred more pages of regulations. The "HHSAR" includes not only regulations applicable to all HHS acquisitions, but also a special set of regulations just for the Public Health Service (PHS).

The regulations do not stop here. Some of the regulations that FAR was intended to replace, the Federal Procurement Regulations (41 CFR), are incorporated by FAR. Some Treasury regulations, e.g., Chapter 2000 of the Treasury Fiscal Requirements, are applied to 638 contracts. 638 contracts are also considered subject to a veritable alphabet soup of agency circulars; for example, OMB Circular A-87, OASC-3, and OASC-5. And finally, both Interior and HHS apply internal manuals and policy memoranda to 638 contracts.

Thus, 638 contracts are subject to a labyrinth of regulations, many of which were designed more for companies furnishing space shuttle parts rather than for tribes operating a mental health program or a school. This can stymie even the simplest of reforms in the 638 process. For example, tribal health contractors recently proposed that the requirement of a detailed monthly invoice of contract expenditures be reduced to a quarterly report. They were informed that Treasury regulations require a monthly invoice.

We proposed the following solution. 25 U.S.C. 450j(a), which subjects 638 contracts to virtually all federal contracting laws and regulations, should be eliminated. If Interior or HHS wishes to apply to 638 contracts any of the regulations thus eliminated, it would have to republish those regulations under the Administrative Procedures Act (APA). Congress must make it clear that the agencies cannot merely republish sets of regulations wholesale -- they must, in consultation with tribes, perform a detailed evaluation of any regulations they wish to apply to 638 contracts, with the objective of minimizing paperwork and unnecessary contract oversight.

We recognize that the agencies will oppose this proposal. In the event that 25 CFR 450j(a) is retained, we support the approach of Section 6, H.R. 1223, which would require that waivers to federal contracting laws and regulations be granted unless they are refused under formal declination procedures. This would make it more difficult for the agencies to deny waivers, both substantively and procedurally.

Regulations that were not drafted for 638 contracts at all are only part of the problem. Some of the regulations developed specifically for 638 contracts are equally inappropriate and burdensome. And, even where agency regulations and policy are fairly reasonable on their face, they can be applied unreasonbly by a particular member of the bureaucracy the agencies have set up to monitor contracts -- contract officers, program officers, program managers, and project officers. A particular officer or manager can greatly complicate the financial reporting requirements, unreasonably restrict access to contract funds through the letter of credit, or erect barriers to contract modifications.

Several of the most glaring examples of these problems are discussed in the section below. It is impossible to formulate a single solution to the overall problem, so a multi-faceted approach is necessary. We suggest the following. First, Congress could mandate the Departments of the Interior and HHS to form a tribal/agency task force to make recommendations on simplifying the 638 process. At IHS, a similar effort has already yielded positive results, although it has been hampered by the agency's insistence on adhering to FAR, Treasury regulations, and other inappropriate sources of policy.

Second, contractors have long requested a field manual setting uniform financial and programmatic reporting requirements. They believe that a field manual would protect them from over-zealous and sometimes adversarial contract personnel. Both agencies should be required to develop such a manual, with intensive participation by tribal contractors.

Third, in areas where contractors have experienced severe problems with excessive contract oversight and the agencies have been unresponsive, Congress should simply mandate needed changes.

Fourth, Congress could mandate the agencies to adopt a different set of reporting and other oversight requirements for contractors that have successfully operated a program for a significant period of time. For example, much of the monthly and quarterly reporting now required could be replaced by one annual independent audit. Experienced contractors' discretion to allocate funds to programs and activities within programs could be greatly increased.

Fifth, we urge the Committee to scrutinize closely the agencies' failure to reduce administrative personnel even as tribal contractors take over more and more programs. Many employees who were formerly involved in direct program administration have now been converted to contract "monitoring". Tribal contractors have concluded that the excess of agency contract personnel has contributed greatly to the problem of burdensome and unnecessary contract requirements. And of course, in failing to shrink as contracts expand, the agencies have deprived contractors of much-needed direct program dollars. Agencies must be forced to reduce excess expenditures for contract oversight.

IV. Lack of flexibility for contractors to run their own programs.

Tribal contractors justifiably complain that when they take over a program, BIA and IHS allow them little flexibility in the way the program is run. They want the contractor to run the program just the way the agency did, even where the Tribe is taking over the program precisely because the agency's performance did not meet the needs of its people.

The agencies' position on this issue is clearly inconsistent with the concept of self-determination, which P.L. 93-638 is designed to foster. We suggest either statutory or report language that will mandate the agencies to give contractors maximum flexibility in designing and operating contracted programs.

Tribal contractors are given insufficient flexibility to allocate funds under their contracts. For example, the Kodiak Area Native Association reports that even for a relatively unimportant funding shift in its BIA contract; e.g., a shift from the supplies line item to the maintenance line item, it must undergo the complicated and time-consuming budget revision process.

The Yukon-Kuskokwim Health Corporation reports a similar problem with the Indian Health Service. At the beginning of each contract year, YKHC submits detailed line item budgets for the programs it will administer. However, during the course of the contract, it sometimes becomes appropriate for YKHC to transfer funds from one program to another. This is due either to unforeseen changes in the level of services, funding shortages, or other factors. When it seeks to reallocate funds, it is subjected to substantial paperwork, lengthy delays, and frequently outright refusal. This is contrary to the policy of self-determination, and also prevents tribal contractors from delivering high-quality health care by preventing them from making needed program adjustments.

These problems are due in part to agency regulations, see 25 CFR 276.14, and they are sometimes due to the whims of individual project officers. We suggest that at least for contractors who have already successfully completed one contract period, no agency approval of budget revisions be required unless there is a corresponding change in the scope of work.

Tribal contractors are also faced with unreasonable restrictions on their ability to enter subcontracts and leases, purchase equipment, and contract for consulting services. Federal approval of even very small purchases of goods and services is required. IHS has recently taken administrative steps to reduce the requirements for federal approval for subcontracts, but retained existing restrictions on purchase, lease, and rental of real property, purchase of property costing more than $500, and purchase of certain equipment regardless of cost -- for example, motor vehicles, ADP equipment, office equipment and furnishings, copying equipment, and any used equipment. The BIA requirements are equally restrictive -- for example, advance approval is required for all purchases of ADP equipment and any capital expenditures. (See 25 CFR 276, App. A.)

We recognize that reforms in these areas ought to be made administratively. However, it is also true that the agencies have been extremely slow to undertake such reforms. We recommend that the Committee direct IHS and the BIA to review their policies regarding federal approval of subcontracts, leases, and purchases of goods and services, including insurance and consulting services. The objective of the review would be to eliminate unnecessary requirements for federal approval, particularly unreasonably low ceilings on unapproved equipment purchases. We also recommend that the Committee take the further step of requiring the agencies to take action on a particular request for approval within 30 days, and if there is no action, the request would be deemed approved.

V. Issues involving the Intergovernmental Personnel Act (IPA)

When a tribe assumes control of a program under a 638 contract, it has the option of retaining current federal employees in the program under the Intergovernmental Personnel Act (IPA) (5 U.S.C. 3371 et seq.). This federal statute permits federal employees to be assigned to state and local governments. The federal employee is either considered to be "on detail" or "on leave without pay" from the agency. As discussed below, the consequences of these two alternatives are somewhat different.

On the whole, use of the IPA by tribal contractors has been beneficial. However, there are two elements to the IPA system that have been detrimental to contractors, and that we do not believe are mandated by the IPA itself.

First, the IPA agreement between the agency, the contractor, and the employee is considered a personal agreement. If the particular employee covered by the agreement leaves the contractor, the contractor must try to hire someone on the open market. It cannot obtain another federal employee, even if there is one willing and available, under a new IPA agreement. This can hamper tribal contractors in securing experienced employees.

The above is true if the tribal contractor wishes to make another IPA agreement with a "detailed" employee. It could, however, secure an IPA agreement with an employee who was willing to go "on leave without pay". But if the employee does this, he or she will receive no credit toward federal retirement during the period of the leave (a maximum of four years under the IPA). This is of course highly undesirable for the employee.

The IPA agreement is also considered specific to the job itself. In other words, a tribal contractor cannot promote an employee covered by an IPA agreement or move that employee to another job. Many experienced federal employees refuse to work for tribal contractors at all, or leave after a short period of time, due to these restrictions.

As noted above, we do not believe that these limitations are required by the IPA. We suggest that a provision be included in the Committee's bill to clarify that where tribal contractors are concerned, an IPA agreement can be entered with a new detailed employee if the original employee leaves the contractor, and that any employee covered by an IPA agreement can be promoted or otherwise transferred to a different position.

On behalf of the Standing Rock Sioux Tribe, the Assiniboine and Sioux Tribes of the Fort Peck Reservation, the Seneca Nation, the Yukon-Kuskokwim Health Corporation, Kodiak Area Native Association, Aleutian/Pribilof Island Association, the Bristol Bay Native Association, and the Association of Regional Health Directors we greatly appreciate the opportunity to present testimony on 638 issues. These tribes and organizations hope to continue to work with the Committee as the process of developing a bill moves forward.

Respectfully submitted,
SONOSKY, CHAMBERS & SACHSE

By: Lloyd Benton Miller
Mary V. Barney

PREPARED STATEMENT OF UNITED SOUTH & EASTERN TRIBES, INC

FEDERALLY RECOGNIZED Tribal Governments, like state and local governments, administer federal grants and contracts in accordance with OMB Circular A-87, as further implemented through HHS Publication OASC-10, which prescribe the method, indirect costs, through which governments are reimbursed for grant-related managerial expenses which cannot be ascribed to any one single grant. These awards, expressed as a percentage of the costs of each grant and contract, are pooled to support the costs of centralized tribal management of the various programs. For most tribes, which, unlike state and local governments have no tax base, indirect cost awards constitute nearly all of the funds on which the tribal administration can be operated. Federal indirect costs are used solely for the proportionate management of federal grants and contracts.

This limitation is assured through a yearly negotiation of an "indirect costs proposal," with the government's cognizant agency, a designated cabinet department which negotiates on behalf of the federal government as a whole. As a method of individualized cost classification, indirect costs negotiations result in widely differing percentages among grantees based on their size (generally, the smaller the amount of funds administered, the higher the indirect cost percentage because of economy of scale), their individual accounting systems, and the mix of programs (some programs have statutory limits on administrative cost percentages.)

A recent OMB directive has designated the Inspector General's Office in the Department of the Interior as the cognizant agency for all of the federally-recognized tribal governments, moving many tribes from DHHS.

Against this background, the Indian Health Service, which has not recently requested adequate appropriations for tribal administrative costs and is concerned with a court ruling that insists funds must be distributed more equitably, has begun implementing a new system for allocating resources based on need—SURAM (Service Unit Resource Allocation Methodology). SURAM as first proposed included a flat fee of around 14% for tribal administrative costs. This proposal has recently been modified; and tribes will be allowed the option of listing administrative costs in terms of approved indirect costs, though displayed as their individual budget line items (thus defeating the purpose of indirect costs as a cost allocation method). IHS is still making changes in the SURAM proposal, and tribes are generally taking a wait-and-see attitude. There is minimal discussion of SURAM in IHS' 1988 budget justification.

Also against this indirect cost background, the BIA, in its 1988 budget justification, has announced a "budget initiative" for a "flat-fee" of 15% for tribal administrative costs. BIA intends to issue this initiative as proposed rules soon and to implement it as a final rule prior to the beginning of fiscal year 1988.

On March 9 through 12, the USET Administrative Operations Committee met in Washington, D.C., to consider the effect of these proposals, especially the BIA initiative, on the financial structures of the member tribes; as well as to examine the current workings of the OMB indirect costs system, any deficiencies it might have shown in the experience of tribal officials, planners, and finance officers, and any alternative approaches that might be taken in providing funding for tribal management of federal grants and contracts. Also considered were the legislative implications of such a system, as the indirect cost system is an OMB prescription, and is not statutory.

Furnishing valuable information and advice to the USET meeting participants were Dr. Emery Johnson, former director of the IHS; Dewey Miller, Regional Director, and Jerry Fiely, Indirect Costs Manager, DOI Inspector General's Office; Hazel Elbert, Jim Thomas, and Bill Ott, BIA; Dr. Robert Birch and Sidney Edelman, IHS; Alex Skibine, House Interior and Insular Affairs Committee staff; and Michael Hughes, Senate Select Committee on Indian Affairs staff.

* * *

The USET representatives found the following operational problems with the indirect costs method as prescribed by OMB:

- Being designed for large grantees (states) with large amounts of non-federal revenues, the way the system deals with over- and under-recovery of costs puts most tribes with low funding levels into financial binds in terms of cash flow, and fluctuating levels of federal funding make financial planning difficult and highly reliant on guesswork.

- Cognizant agencies in many instances impose "exclusions" from the cost pool not mentioned in the Circular, and funding agencies during contract negotiations impose more "exclusions" on top of those; so tribes fail to gain administrative funding for many programs they are operating. Welfare grants, for example, are excluded from the indirect costs calculation, despite the fact that much administrative work is involved in the multiple individual checks that are required to be issued to welfare recipients during a month. Some refer to these as "pass through" funds, a term originally restricted to those funds appropriated by another cabinet department "passing through" the BIA to a tribe.

- Other cabinet departments require tribes to come up with budget justifications for their indirect costs, already approved by the tribe's cognizant agency, which is a duplication of effort, and which puts an excessive burden on tribes with few resources to pursue these repetitive tasks.

- The process, especially in "fixed rate carry forward" mode, ignores statutory administrative percentage limitations for some programs.

- Federal legislative and executive branch decision-makers generally do not have a clear understanding of the purpose of indirect costs, nor of the fact that they are regulated through annual negotiations with the cognizant agency.

- BIA and IHS officials do not understand the integral role of indirect costs in the successful management of their contracts, in enabling tribal management systems/essential to carrying out all programs, and their role in strengthening tribal governments as institutions in accordance with Public Law 93-638.

- Analyzing tribal rates in the conglomerate is of little practical use because all use different bases, and split the categories of direct and indirect differently. (One tribe, for example, may charge postage as an indirect cost, while another, based on its agreement with the cognizant agency, may assess each program budget for its own postage.)

- There are not sanctions imposed on the Federal agencies if they do not conform with the provisions of OMB Circular A-87.

Several other problems with indirect costs were also discussed by the group, but the group came to the conclusion that the indirect costs method is the only system currently available or proposed that could assess management costs without requiring debilitating levels of paperwork to ascribe small, specific costs (a five-minute phone call for example) to specific contracts. In fact, this is the very reason indirect costs were invented. Overall, the system has worked well for tribes. Though not perfect, it does provide recognition of the special nature of each tribe's or grantee's management system, while at the same time providing for federal control through the yearly negotiation process.

The arbitrary Bureau of Indian Affairs 15% fee, a method to enhance revenues rather than a way to allocate revenues among functions, considering the vast differences among tribal administrative systems, would in fact be equally as arbitrary at 2% or at 45%.

BIA justifies the proposal on the bases of two outdated, BIA-funded studies, one of which found the average tribal indirect cost rate to be 24% (as rates have different bases, it averaged apples and oranges), the other of which set BIA's own costs of administration at 8% of the BIA budget. The latter study's methodology was severely flawed, and many administrative-type costs were not included; but even if the 8% figure were accurate, it would have had severe implications for the BIA. An 8% rate for a budget of $1 billion is a whopping rate.

The BIA initiative, on which no tribal consultation was obtained, consists of a few lines in the budget justification, not a written plan with details. We have already learned that the "flat" rate is not in fact so flat, that certain important exclusions would be made before its calculation. The BIA maintains that it would be "no strings" money that would not be subject to audit, but all federal funds are subject to audit; and tribes prefer that.

Tribes' other funding sources, such as ANA, CDBG and the Department of Education would continue to honor approved indirect cost rates, so tribes would have to establish a dual system or lump in the 15% with funds awarded at another rate, a situation difficult to track, to audit, and to implement inexpensively.

Accepting the inaccurate 24% average indirect cost on its face, the new BIA proposal would constitute an overall 40% administrative costs cut to tribes and would have a far worse impact on the small tribes, the low funding levels of which now result in relatively high indirect cost rates. The Bureau's proposed recompense to these smaller tribes, the "Revenue Sharing for Small Tribes," would average $24,000 per tribe.

It is very difficult not to believe that the BIA has been playing the budget cutting game largely at the expense of tribes. For a number of years in its justifications the Bureau under-estimated General Assistance (Welfare) and tribal administrative needs, then asked for inclusion of increased welfare payments in the supplemental appropriations, and funded tribes for only a percentage of the indirect costs that were due them. When the Congressional committees, in time, raised the indirect costs issue, one of the BIA-funded studies referred to above ("Development of P.L. 93-638 Section 106(h) Distribution Formulas," BIA Contract K51-0026) which called indirect costs "an open-ended, uncontrollable entitlement fund, the size and distribution of which depend(s) on the initiative and ingenuity of each tribe in expanding its expenses . . ." was cited repeatedly; and the Congress "folded" indirect costs into direct. If the BIA is to use statements such as these, they should be substantiated by credible evidence; there is no widespread misuse of indirect costs substantiated by audits of other investigations. (This was later reversed in the fiscal year 1987 conference report because of the extensive errors made by the BIA Central Office with prior folding.) What was not cited by the Bureau was the contemporaneous report of the Interior Office of the Inspector General to the Assistant Secretary--Indian Affairs "Trend Analysis," July 1983) which found major increases in tribal indirect cost rates (pp.4-5) to have had definite reasons for having occurred during the five years studied. Indirect cost rates have since, we believe, leveled off, as tribes reached levels of basic administrative and managerial sophistication.

Why is it that tribal governments, admittedly relative newcomers to the A-87 process, are being confronted by their two principal funding agencies with attempts to circumvent the method of, and reduce the compensation for, indirect costs; when local governments, hospitals, universities, and 501(c)(3) corporations are apparently having few if any troubles with their funding agencies? Why has the system apparently worked well for years on a government-wide basis, until these two agencies saw fit to buck that system?

The answer is surely multi-faceted, but one two-part factor is probably paramount: under P.L. 93-638 tribes and the BIA/IHS become competitors for the same pot of federal dollars; and when the federal agency, the competitor that proposes the budget, must take a cut, it tries not to do so at the expense of its own employees.

A great deal of the current confusion over indirect costs, a way of allocating costs, stems from BIA's establishment of it in the high-spending days as an entitlement for tribal governments, which prevented the question of the lowering of BIA direct administrative costs from arising. This method also postponed a thorough examination of the implications of section 106(h) of the Act, a provision with which the new BIA initiative is clearly in conflict.

* * * * *

With respect to the BIA, and to a lesser but still urgent extent, IHS initiatives, United South & Eastern Tribes, Inc., respectfully requests the aid of the members of the United States Congress in:

1. Assisting the federally-recognized tribes by correcting the deficiencies in the current indirect costs process carried out under the auspices of A-87 and OASC-10, after

2. Funding an independent assessment to determine what the appropriate mechanisms and rates are for tribal management costs, under which assessment would include consultation with a valid sample of tribal governments

3. Funding a timely independent assessment to determine actual needed BIA and IHS management costs and management structure for Indian programs, the relation of these costs to the level of contracted, as opposed to direct, dollars administered and the potential for a major streamlining; also including consultation with a valid sample of tribal governments; and primarily, after

4. Prohibiting, by language in the fiscal year 1988 Interior and Related Agencies appropriations bill, implementation of the Bureau of Indian Affairs' 15% flat fee initiative, and directing that current approved indirect cost rates be honored and funded, and requiring the IHS to re-establish for both new and ongoing contract indirect costs, a separate budget line item, and

5. Supporting the addition of $10-12 million to the Interior budget, as recommended by the Senate Select Committee on Indian Affairs, the estimated amount needed to fully fund tribal BIA indirect costs in fiscal year 1988 and $5 million for existing IHS contracts and grants.

Certified, this 11th Day of March, at a meeting held in Washington, D.C.

Joel M. Frank

Joel Frank, President

Eddie L. Tullis

Eddie Tullis, Vice-President

UNITED SOUTH & EASTERN TRIBES, INC.
RESOLUTION 182

WHEREAS, the member tribes of United South and Eastern Tribes (USET) engage in a very high level of P.L. 93-638 contracting to administer Bureau of Indian Affairs (BIA) programs and services; and

WHEREAS, all of the USET member tribes have negotiated indirect cost rates in compliance with OMB Circular A-87 to cover their costs of administering such contracts with the BIA; and

WHEREAS, the BIA has consistently and significantly under-estimated and failed to request from the Congress adequate funding to pay tribes the full amount of their negotiated indirect costs; and

WHEREAS, the consistent shortfall in contract support funding has resulted in large deficits for many tribes; and

WHEREAS, such funding shortfalls have the effect of discouraging contracting by tribes; and

WHEREAS, the proposed contract support budget for fiscal year 1988 is once again significantly under-estimated.

NOW THEREFORE BE IT RESOLVED: that the member Tribes of USET strongly urge the United States Congress to increase the fiscal year 1988 contract support appropriation of the BIA over their requested budget by no less than $12 million and further that the BIA be directed to reimburse tribes at their full negotiated indirect cost rate.

CERTIFICATION

This resolution was duly passed at the USET Indirect Cost Meeting, March 11, 1987, in Washington, D.C., at which a quorum was present.

President
United South & Eastern Tribes, Inc.

Julius Herne KHH
Secretary
United South & Eastern Tribes, Inc.

UNITED SOUTH AND EASTERN TRIBES, INC.
RESOLUTION 180

WHEREAS, the member tribes of the United South and Eastern Tribes (USET) engage in a very high level of P.L. 93-638 contracting to administer Bureau of Indian Affairs (BIA) programs and services; and

WHEREAS, all of the USET member tribes have negotiated indirect cost rates in compliance with OMB Circular A-87 to cover their costs of administering such contracts with the BIA; and

WHEREAS, BIA officials have advised that they intend to supplant each negotiated indirect cost rate with a flat administrative cost payment to tribes of 15 percent of the total contracted dollar amount excluding pass through funds; and

WHEREAS, the USET member tribes find that the proposed 15 percent administrative fee of the BIA:

- is ill conceived and proposed without proper consultation with Indian tribes;
- based upon the findings of an outdated and questionable study by the American Indian Law Center;
- will result in inadequate payment to tribes to cover the costs of contract administration resulting in tribes incurring large deficits and retroceeding contracted programs back to the BIA which in turn will frustrate self-determination and increase reservation unemployment;
- is in violation of Section 106(h) of P.L. 93-638;
- fails to consider the varying contract support costs of the respective tribes and regions of the country; and
- has no rational basis other than administrative simplicity and budget reductions; and

WHEREAS, there has been no demonstrated pattern or practice of abuse by tribes in negotiating their indirect cost rates;

NOW THEREFORE BE IT RESOLVED: that the member tribes of USET strongly urge Congress to block any and all efforts of the BIA to implement their proposed 15 percent administrative cost proposal; and

USET Resolution #________________
Page Two

BE IT FURTHER RESOLVED: that the BIA be Congressionally directed to provide contract support to tribes based upon their negotiated cost rates.

CERTIFICATION

This resolution was duly passed at the USET Indirect Cost Meeting, March 11, 1987, in Washington, D.C., at which a quorum was present.

President
United South & Eastern Tribes, Inc.

Julius Hesne KH
Secretary
United South & Eastern Tribes, Inc.

UNITED SOUTH AND EASTERN TRIBES, INC.
RESOLUTION 181

WHEREAS, the member tribes of the United South and Eastern Tribes engage in a high level of P.L. 93-638 contracting of Indian Health Service programs; and

WHEREAS, contract support funds to reimburse tribes for their negotiated indirect cost rates are currently not segregated in a separate budget line item, but are rather lumped in the consolidated budget lines for program services; and

WHEREAS, this failure to segregate contract support funds tends to distort the perception of how much funding is available for direct health services; and

WHEREAS, any increased cost of contract administration results in a direct and corresponding decrease in funds available for health services; and

NOW THEREFORE BE IT RESOLVED: that the USET member tribes recommend and urge the United States Congress to segregate and appropriate the contract support funds of the Indian Health Service as a budget line item separate and apart from the budget line items for health services.

BE IT FURTHER RESOLVED: that the Congress appropriate an additional $10 million for IHS Contract Support for fiscal year 1988.

CERTIFICATION

This resolution was duly passed at the USET Indirect Cost meeting, March 11, 1987, in Washington, D.C., at which a quorum was present.

President
United South and Eastern Tribes, Inc.

Julius Herne
Secretary
United South & Eastern Tribes, Inc.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service
Indian Health Service

Health Resources and
Services Administration
Rockville MD 20857

MAR 27 1985

Susan B. Geiger
Preston, Thorgrimson, Ellis & Holman
1735 New York Avenue, N.W.
Suite 500
Washington, D.C. 20006-4759

Dear Ms. Geiger:

This is in response to your letter of March 13, 1985, to Les Morris requesting an informal hearing before the IHS Contract Proposal Declination Appeals Board. I understand that a meeting with the Board has been tentatively scheduled for April 9, 1985. I note, however, that in your letter you state:

> SEARHC will be prepared to show that the amount of its contract proposal does not exceed the amount of the fund[s] to which SEARHC is entitled under Section 106(h) of P.L. 93-638, 25 U.S.C. 450j(h). The amount of funding to which SEARHC is entitled by law is more than adequate to address the alleged "shortfall" denoted by IHS. Therefore, the issue of SEARHC's entitlement to these funds is critical to the usefulness of the hearing to SEARHC and will be the focus of our presentation.

This statement indicates a misunderstanding regarding the Board's jurisdiction which I want to clarify. SEARHC's contentions as to how much money SEARHC is entitled to by law under section 106(h) of P.L. 93-638 is not a matter within the Board's jurisdiction. The Area Director, in his declination letter, made this perfectly clear by stating that the question before the Board is whether SEARHC has, or will have by the beginning of the contract period, the funds necessary to make up the difference between the Area Office's determination of the IHS funding available and the amount proposed by SEARHC.

The Area Office's determination of the funding that is available is based upon the Area budget allocation for the Mount Edgecumbe Service Unit. I have been advised by the

Department's Office of the General Counsel that IHS budget decisions are not reviewable under the Indian Self-Determination Act. That Act provides authority for the IHS to contract with Indian tribal organizations, but does not provide budget or apportionment authority. Such authority is instead provided by the Snyder Act, 25 U.S.C. 13. Congress did not intend the P.L. 93-638 review and appeals process to extend to budget allocation decisions made outside the contracting process and under the authority of different statutes.

Consequently, contentions that the IHS is legally required to allocate more than has been budgeted for the Service Unit are beyond the jurisdiction of the Board and will not be considered at the hearing. I want to clarify this aspect of the Board's jurisdiction so that there will be no misunderstanding at the time of the hearing.

Mr. Les Morris will contact you to confirm the hearing date and travel arrangements.

Sincerely yours,

Everett R. Rhoades

Everett R. Rhoades
Assistant Surgeon General
Director, Indian Health Service

MISSISSIPPI BAND OF CHOCTAW INDIANS
OFFICE OF THE TRIBAL CHIEF

TRIBAL OFFICE BUILDING
ROUTE 7, BOX 21
PHILADELPHIA, MISSISSIPPI 39350
TELEPHONE (601) 656-5251

November 10, 1986

Mr. James C. Meredith, Program Director
Nashville Program Office
Indian Health Service
Suite 810, 1101 Kermit Drive
Nashville, TN. 37217-2191

Dear Mr. Meredith:

In accordance with Clause No. 18 governing Litigation and Claims of Pub. L. 93-638 contracts, I am enclosing two copies of documents received in relation to Civil Action No. E86-0062(L), The Estate of Suzette Nicole Willis, Deceased, et al. vs. The United States of America and Mississippi Band of Choctaw Indians. The second set of documents are being provided you for the Contracting Officer on the Choctaw Health Center contract.

I am deeply concerned over the situation in which the tribal contractor has been placed in this litigation. It appears that the United States was originally sued and, without notifying me, reached a settlement agreement whereby the federal government would be discharged from any further liability upon paying $61,500. Simultaneously, however, the government provided documents in discovery indicating the existence of tribal insurance coverage up to $1,000,000. This action is particularly disturbing in that it appears on the face of the pleadings that the government's commissioned corps employee was primarily responsible for the liability created in this situation.

Please advise as to any further instructions you might have on this matter. Meanwhile we will proceed to work with our insurance carrier towards resolution of this claim.

Sincerely Yours,

Phillip Martin

Phillip Martin
Tribal Chief

PM:es

encls.

"CHOCTAW SELF DETERMINATION"

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Washington, D.C. 20201

E. Dr. it → see me
L. Rivers
H. Ben
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DEC 19 1986

Phillip Martin, Tribal Chief
Mississippi Band Of Choctaw Indians
Tribal Office Building
Route 7, Box 21
Philadelphia, Mississippi 39350

Re : The Estate of Suzette N. Willis, Deceased, et al.
v. United States of America, et al.

Dear Chief Martin:

I have been asked to respond to your letter of November 10, 1986 addressed to James C. Meredith, Program Director of the Nashville Program Office of the Indian Health Service. My office handled the administrative tort claim in the above case and, when suit was filed, cooperated with Dan McDaniel, the Assistant United States Attorney who represented the government.

At the time we denied the administrative claim, we advised the claimants' lawyer that Dr. Artis was a federal employee, but that the Choctaw Hospital was operated by the Mississippi Band of Choctaw Indians under a contract with Indian Health Service. When the plaintiff requested a copy of the contract as part of the pre-trial discovery, the United States had no choice but to provide it.

I am advised that you and/or your attorney had several telephone conversations with Mr. McDaniel and that you were advised that Mr. McDaniel, based on the additional information he had uncovered, concluded that the United States should settle the case in which the United States was the only party. At the same time, he also explained to you in what areas he thought the Hospital might be found liable.

It is not unusual for a defendant party to settle a case if he determines that he may be found liable by the court. If, as you contend, our officer was primarily liable, there should not be a severely adverse result to the Tribe.

REC

DEC 29 1986

Miss. Band of Choctaw Indians

Sincerely yours,

Timothy M. White, Chief
Litigation Branch
Business and Administrative
Law Division

cc : Duke McCloud
James C. Meredith

REC'D FEB - 2 [illegible]

MISSISSIPPI BAND OF CHOCTAW INDIANS
OFFICE OF THE TRIBAL CHIEF

TRIBAL OFFICE BUILDING
ROUTE 7, BOX 21
PHILADELPHIA, MISSISSIPPI 39350
TELEPHONE (601) 656-5251

January 29, 1987

Mr. Timothy M. White, Chief
Litigation Branch
Business and Administrative Law Division
Department of Health and Human Services
Washington DC 20201

Re: The Estate of Suzette N. Willis, Deceased, et. al. v. United States of America, et. al.

Dear Mr. White:

I am in receipt of your response dated December 19, 1986 and received by my office December 29, 1986 concerning the above-referenced litigation. I appreciated your effort to reply to the concerns expressed in my November 10, 1986 letter, but your information on which you premised your conclusions was somewhat inaccurate in its chronology and you seem to have missed the true point of our contention.

Initially it should be pointed out that no conversations took place between Mr. McDaniel and me or any attorneys on my behalf until after the United States had effected its settlement in the case. The initial final decree was signed by United States District Judge Tom Lee on October 29, 1986 and the amended complaint first naming the tribe as a defendant was filed the same day and received by my office subsequent thereto. It was only upon being served with the amended complaint that my office became aware of the lawsuit and communicated with Mr. McDaniel for the first time regarding the matter.

I appreciate the fact that as you stated, "It is not unusual for a defendant party to settle a case if he determines that he may be found liable by the court." Too, I recognize that if it is determined that your officer was primarily liable, there should not be a severely adverse result to the Tribe. Nonetheless, those statements avoid the true basis of my concern.

Pursuant to Pub. L. 93-638 contract provisions, the Tribe contracted to operate the Choctaw Health Center retaining its sovereign immunity except to the extent that it secured insurance coverage for reimbursement of the United States due to claims incurred arising out of tribal performance of its contractual duties and operations. Thus the only liability for which the tribe or its insurer could be held accountable was

"CHOCTAW SELF-DETERMINATION"

a type of "derivative liability" unto the United States to reimburse them for losses which the United States incurred; in all other situations tribal sovereign immunity would pose a bar to recovery. In this factual situation it appears that the negligence was virtually exclusively that of the United States' Commissioned Corps doctor and yet it appears that the government settled for a comparatively small amount while simultaneously allowing the plaintiffs to conclude that further recovery could be obtained against the tribe. The unfortunate consequence is that while it enabled the government to avoid full payment for its agent's negligent malpractice it leaves the tribe in a position of arguing a comparatively strong point of law -- its sovereign immunity from suit -- under a set of most unequitable and unfortunate circumstances of fact. Given, further, that privity of contract exists between the United States and the tribe and the additional point that congress encourages and largely mandates such contractual engagements, a certain element of unconscionability seems imputable unto the government in this situation.

This action is unfortunate in that it causes the tribe to project a very disfavorable image in court, potentially threatens the doctrine of tribal sovereign immunity and lends further discouragement to tribal contracting activities. On a more personal note it is also unfortunate in that this family, which has already suffered the loss of the infant daughter as a result of your employee's negligent malpractice, shall suffer further from being duped into a premature settlement in the belief that further recovery might also be bad against the tribal insurance carrier.

I understand that Dr. Rhodes has appointed a task force under the Portland Area Director to study the malpractice insurance issue in connection with tribal 638 contracting. To me this particular situation poses the very type of problem the panel needs to study and to that end I hope to see that the handling of this claim is fully analyzed to see if perhaps a more appropriate interrelationship might be established between the federal and the tribal contracting governments when handling liability claims.

Again, I appreciate your reply to my earlier letter and I hope that this further elaboration on the basis of my concerns serves to better inform your office so that hopefully there will never be a repeat of this situation with us or with other tribal contractors.

Sincerely yours,

Phillip Martin

Phillip Martin
Tribal Chief

PM:bmw

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March 17, 1987

Alexander Skibine
Assistant Counsel, Indian Affairs
House Interior and Insular
Affairs Committee
House Office Building
Room 522 Annex 1
New Jersey and C Street N.E.
Washington, DC 20515

Dear Mr. Skibine:

I am writing in follow-up to our telephone conversation of March 10, 1987 in which I called your attention to the existing language of Section 11 of HR-1223 which proposes to enact a new Section 112 of Public Law 93-638 by amendment and in particular to the second sentence thereof.

My concern was that the existing language of proposed Section 112 does not cure the theoretical over-recovery problem, but indeed affirms or ratifies the Office of Inspector General's existing procedure of ignoring the lack of full payment when calculating theoretical over-recovery adjustments for PL 93-638 contractors.

In our conversation I proposed the following language in substitution for the second sentence of the proposed Section 112:

> Where a contractor's allowable indirect cost expenditures are below the level of indirect costs that the contractor should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any federal, state or other agency, such shortfall in expenditures shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such contractor.

To illustrate why I believe my proposed language is better at solving the theoretical over-recovery problem I enclose excerpts from a brief which I have on file with the Interior Board of Contract Appeals in which I am resisting (on behalf of the Alamo Navajo School Board, Inc.) the imposition of a theoretical over-recovery carry-forward which was caused by the BIA's failure to fully fund the contractor's indirect cost at the amount called for by the approved indirect cost rate.

Other improvements in the existing indirect cost/contract support system for PL 93-638 contracts are also needed e.g. the need to ensure that contractors can save and carry-over indirect cost/contract support funds for expenditure in future years without their receipt and carry-over into future years being deemed to constitute an over-recovery of indirect costs in the prior year which would produce an actual (as opposed to theoretical) over-recovery carry-forward in some future year.

If I can provide any further information or assistance please feel free to call.

Sincerely,

Bryant Rogers

Carl Bryant Rogers

CBR:tao

cc: Bobo Dean, Esquire
ANCCSB
Black Mesa Community School
Little Singer School
Ramah Navajo School Board, Inc.
Borrego Pass School
Alamo Navajo School Board
A School For Me, Inc.
Shiprock Alternative High School
Rock Point Community School
Navajo Academy
Phillip Martin

MAR 30 RECEIVED

3/26/87

DEPARTMENT OF HEALTH & HUMAN SERVICES
PUBLIC HEALTH SERVICE

March 23, 1987

Refer to: A-PCOS

Copy to
Dick
[illegible]

ALASKA AREA NATIVE HEALTH SERVICE
BOX 7-741
ANCHORAGE ALASKA 99510

Robert J. Clark
Executive Director
Bristol Bay Area Health Corporation
P.O. Box 130
Dillingham, Alaska 99576

Dear Robert:

During my trip to Bristol Bay, questions regarding what needed to be done by your corporation for you to be reimbursed for Retention Pay Equivalent and Continuation Pay Equivalent were raised. I was given a copy of the employment agreement that you currently use, to review with appropriate Area personnel, to determine what changes needed to be made in your personnel system and employee agreements to contain similar standards to those of the Federal Government for the same purposes. Basically, changes in both your personnel policies and employment agreements would have to be made for your system to be comparable to meeting the requirements as stated in the Commissioned Officer Personnel Manuals, Subchapter CC22.2. As I understand it, once the appropriate changes were made and approved, you then could submit documentation, through me, that the individual had received the equivalent of Retention or Continuation Pay. I would forward the claim for reimbursement to our Financial Management Branch for submission to our Headquarters. On receipt of the reimbursement from Headquarters, the amount would be modified into your contract on a non-recurring basis. All funds referred to in ISDM 85-4 are non-recurring in nature and as stated, reimbursement is contingent on availability of funds at the Headquarters level.

If you decide to proceed with this matter a good contact regarding both the personnel policy and employee agreement changes would be Marge Amos in the Area Personnel and Training Branch. She can be reached at 257-1366.

I would appreciate participating in any meetings that might be held by members of your staff and Area Office staff or being copied on correspondence that might occur in this regard. If I can be of further assistance please let me know.

Sincerely,

K W Isaak
Ken W. Isaak
Project Manager/Officer
Patient Care Operations Section
Alaska Area Native Health Service

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Washington D C 20201

APR - 2 1987

Robert H. Wagstaff, Esquire
Wagstaff, Pope, Rogers & Clocksin
912 West Sixth Avenue
Anchorage, Alaska 99501

Re : Ingram v. Livermont, Bristol Bay Area Health Corp.
Your File No. 2013.10

Dear Mr. Wagstaff:

This is in reply to your March 10, 1987 letter to Virginia Mitz, of my office. You asked about an "appeal" from her "decision" declining a tender of defense in the above case.

There is no appeal mechanism from a decision to reject a tender of defense in such a case. However, I have reviewed the determination and agree that there is no cause of action against the United States under the Federal Tort Claims Act. The Bristol Bay Area Health Corporation is a contractor with the United States. The Federal Tort Claims Act specifically provides that "any contractor with the United States" is not an agency for purposes of the Act. 28 U.S.C. §2671. See, Logue v. United States, 412 U.S. 521 (1973) and Wood v. Standard Products Co., Inc., 671 F.2d 825 (4th Cir. 1982).

Sincerely yours,

Timothy M. White

Timothy M. White, Chief
Litigation Branch
Business and Administrative
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May 1, 1987

The Honorable Daniel K. Inouye
Chairman
Senate Select Committee on
Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510-6450

Dear Senator Inouye:

The purpose of this letter is to provide comments for the record of the April 22, 1987 oversight hearing on the Indian Self-Determination and Education Assistance Act, Public Law 93-638, for a number of our clients which are Indian tribes and tribal organizations administering programs under that Act, including the Metlakatla Indian Community, the Miccosukee Tribe of Indians of Florida, the Oglala Sioux Tribe of the Pine Ridge Reservation, the Oglala Sioux Tribal Public Safety Commission, and the Bristol Bay Area Health Corporation.

While our clients have taken advantage of the opportunities for more effective reservation self-government provided by the Congress in Public Law 93-638, a number of difficult obstacles remain in the achievement of the goals of that Act. In the legislation the Congress made a finding that

> "the prolonged federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities."

A continuing theme in the implementation of the Indian Self-Determination act has been the failure of the federal bureaucracy, both in the Bureau of Indian Affairs and the Indian Health Service, to give effect to the Congressional goals stated in the Act by working closely and cooperatively with Indian tribal leadership to increase the degree to which Indian tribes have an effective voice in the planning and implementation of Indian programs and to reduce the extent of federal domination of such programs which remains pervasive in the Indian country.

As will be indicated below, some of the obstacles to self-determination could be removed or significantly reduced through amendment to the Act. However, many of the most obvious problems that Indian tribes encounter in the attempt to achieve the goals of the act result not from the language of the Act, itself, or even from the regulations of the Department of the Interior or the Department of Health and Human Services issued pursuant to the Act but rather from the failure of agency policy or guidelines to conform to the clear and specific requirements of the Act and of the regulations of the respective secretaries. We urge that your Committee engage in effective oversight activities to require the Bureau of Indian Affairs and the Indian Health Service to cease interfering with the implementation of the Indian Self-Determination Act through illegal activities and actions which discourage Indian tribes from exercising the full scope of their legal authority.

Since most of the issues covered in this statement relate to both agencies our comments will be organized on the basis of issues and our suggestions will be provided for both BIA and IHS under each significant issue.

Funding Level Issues

In section 106(h) of P.L. 93-638 Congress directed that the amount of funds provided under the terms of contracts entered into under the act "shall not be less than the appropriate secretary would have otherwise provided for his direct operation of the programs or portions thereof for the period covered by the contract." The most frequent difficulties which Indian tribes have encountered in the exercise of their rights under P.L. 93-638, in our experience, have related to the implementation of this provision of the statute. Both agencies have promulgated regulations which are designed on a reasonably fair and equitable basis to assure that the "secretarial funding level" provides the basis for the contract amount made available to the contractor. However, problems have arisen in a number of areas with respect to the determination of the funding level which the Secretary would have provided to the program.

Essentially, these problems have been of two kinds. First, there have been disputes over the actual amount of funds available to the federal agency to operate the program within its own budget structure. Secondly, disputes have arisen over the amount of funds provided in support of the program by the Secretary from sources other than the budget component to be contracted. (For example, area office support, headquarters support, legal advice from the general counsel or solicitor's office, and similar activities.) In addition, contracts under P.L. 93-638 require Indian tribes to incur expenses (such as insurance) which are not normally incurred by a federal agency in the operation of a federal program. Indian tribes should, of course, not be encouraged to operate programs without adequate liability and other forms of insurance, and reasonable types and levels of insurance have been provided for by both agencies in their regulations.

(1) Program Funds. We will consider first the problem of "program funding". Program funding is the amount of funds which the respective agency provided for its own operation of the program to be contracted at the location under contract. For example, in the case of the Bureau of Indian Affairs, this means the budget for a particular reservation law enforcement program being operated by the Bureau. In the case of the Indian Health Service a comparable example would be a hospital or clinic being operated by the Indian Health Service. In principle there has been no dispute that the amount of funds available in the BIA or IHS budget for such activities are required to be provided under contract to the tribe under P.L. 93-638. Since most contracts are negotiated in advance of the fiscal year during which the contract will commence, the agencies should negotiate a contract budget based upon the secretary's planned funding level for the subsequent year.

Generally, in the case of the Bureau of Indian Affairs it is not difficult to determine what that planned amount is, especially if the program to be contracted is covered by the Indian Priority System under which Indian tribes have input into the priority levels of funding of Bureau programs. The Indian Priority System provides a detailed record available at key specific times in the budget development process. Consequently, it is possible to obtain from the Bureau of Indian Affairs at the time its budget goes to the Congress the amount which is included for a particular reservation program in that budget for the next fiscal year.

In the case of the Indian Health Service it is somewhat more difficult to establish this amount, but normally the IHS has anticipated in the past that an administration budget calling for the same amount of funds for hospitals and clinics in the next fiscal year as in the current fiscal year would result in the same level of funding for a particular hospital or clinic (except as an adjustment might be required by the ear-marking of funds for certain specific purposes, such as staffing new facilities). In other cases it may be possible that the level of funding for a particular program to be contracted can be established through consulting the legislative history of the appropriation legislation.

However, in the case of the Bureau of Indian Affairs we are currently representing two tribes which are involved in administrative appeals due to the failure of the Bureau to conform to the Indian Priority System and the tribe's right to the amount of funding which the secretary would have had available (as clearly indicated by that system) for the operation of the program. In one case, the Bureau has simply unilaterally decided to skim something over $100,000 off the top of the Pine Ridge Reservation law enforcement program to fund its own activities. In the other case, the Bureau has elected to provide an increase mandated by the Congress to a particular tribe's law enforcement program only for the first year in which the funds were provided and not to include those funds in the base funding level for future years, even though such was clearly the intent of the Congressional appropriations committees and all other funds so provided by the Congress at the same time have been included in the recurring base programs of the respective reservations. These actions by the Bureau are inconsistent with the requirements of section 106(h), and, as well, deviate from the official Bureau policy with respect to consultation with tribes in the development of its budget.

Similarly, the Indian Health Service has failed to carry out a Congressional directive to fund the operation of the new Kanakanak Hospital in Alaska at at least 89% of need in FY 1987. In addition, IHS has unilaterally reduced all FY 1987 contract budgets by two percent for the purpose of redistributing such funds based on criteria and data not yet fully disclosed. This action may also lead to contract dispute proceedings. In our opinion, the unilateral 2% reduction in FY 1987 was in breach of the contractual obligations of the United States which had contracted with tribes, including a funding availability clause normally interpreted (by IHS and HRSA contracting staff, as well as by those of other agencies) to condition the Government's obligation to provide the negotiated budget simply upon the appropriation of funds by the Congress adequate to fulfill the contract, without reserving the right to make further discretionary funding reallocations. See Appeal of Healy Co., IBCA 944, 74-2 BCA 10708 (1974); Crisp County v. Groves & Sons, 73 F.2d 327 (5th Cir. 1954).

However, recently the Indian Health Service issued a new model contract under P.L. 93-638 in which it will expressly reserve the right to reduce the negotiated contract amount for the purpose of implementing the IHS Resource Allocation Methodology. Apparently, this extraordinary right to adjust the contract amount downward would continue throughout the contract year and would (based on prior experience) not be exercised until May or June of the year after RAM determinations are made. If the reduction is to be more than 3%, IHS agrees to report to the Congress. This system cannot help but disrupt the orderly planning of 638 contract operations and further discourage the implementation of P.L. 93-638. Congress should prohibit unilateral budget modifications (already prohibited by IHS and BIA regulations) and require IHS, in implementing the Resource Allocation Methodology, to announce definite funding levels (based on existing RAM data) at the time contracts are negotiated. In order words, IHS should have its marbles together when it sits down to negotiate. Congress can ease this problem by appropriating funds specifically for distribution to tribes determined to be deficient under RAM.

In general, the Congress needs to look closely at the way in which the agencies have implemented the mandate of section 106(n) and to review the existing appeal procedures which are available to tribes in this area. We will discuss the appeal procedures below.

(2) Contract Administration Costs. The most frequent funding level issue which has arisen with respect to both agencies involves the failure to adequately fund Indian tribal contractors to carry on those activities which are not performed at the local level by the respective agency either because they are performed from another office within the Department or because they are not performed by the federal government at all. This is the problem sometimes known as "the indirect cost problem." Essentially, it is also a matter of compliance with section 106(n). The statute requires that the Secretary should fund the program at the level that he would have funded it if he were operating it himself. That means that the cost of those activities which he would have carried on from sources outside the program being contracted but which the contract requires the contractor to carry on, should be added to the contract amount

by the Government. It also requires an adjustment where the contractor must do things which the federal government does not normally do. Otherwise, the contractor will be required to reduce the level of services in order to pay for those activities.

The agencies have treated this issue somewhat differently, but in each case the result has undermined the achievement of the goals of the Act. Initially, the Bureau of Indian Affairs proposed to pay "negotiated indirect costs" established by the Inspector General of the Department of the Interior in accordance with procedures approved by the Office of Management and Budget as a means of providing the additional funding needed to meet this problem. While it is true that indirect cost procedures do not necessarily result in the precise amount of funding needed to prevent a 638 contractor from being inequitably forced to absorb administrative costs as discussed above, as a practical matter this approach worked. However, in 1985, after alleging (without providing any evidence of the charge) that tribes were taking advantage of the indirect cost procedure, the Bureau of Indian Affairs determined that it would no longer make annual adjustments in the indirect cost funding provided but would guarantee indefinitely for the future, or "grandfather," the same amount of indirect cost funding which it had provided in FY 1984 with respect to continuing contracts (but no more). This approach failed to take into account that the reasonable amount needed for such costs may vary from year to year based upon a variety of reasons which are beyond the control of the contractor. For example, the contractor's other federally-funded activities may decline so that a larger proportion of its administrative overhead will (and should) fall upon BIA- or IHS-funded programs. In addition, federal requirements may augment the administrative activities which a contractor must carry on.

In proposing this system the Bureau of Indian Affairs ignored a study by its own Inspector General which indicated that the increase in contract support allocations for indirect costs to Indian tribal contractors was due to reasons beyond the contractor's control. More recently, the Bureau of Indian Affairs has proposed to eliminate the grandfathering system put in place in fiscal year 1984 and to move ahead instead to the allocation of 15% for administrative costs to each contractor regardless of the size of the contract or other factors which might affect the proportion between overhead costs and direct program costs. The 15% proposal is still under review in the Bureau of Indian Affairs but has been withdrawn for the current fiscal year. At present, the Bureau is refusing to inform contractors as to the basis on which indirect costs will be provided in the next contract year.

It is clear to us that the 15% proposal must have been developed by persons who have no real understanding of the nature of overhead costs. In particular, the application of the 15% limit to very small contractors would have been devastating. The programmatic effect would have been to deny to small tribes or small tribal organizations (such as contract schools operating particularly small or isolated day-schools) the opportunities provided for in Public Law 93-638.

The Bureau is continuing to allocate indirect costs on the grandfathered basis in FY 1987. It should be noted, however, that when the Bureau implemented this system it promised to pay 100% of such costs, but in fact began paying only 92.5%. There are still significant shortages in the reimbursement of grandfathered contract support even though the Congress appropriated funds to the Bureau in FY 1987 for the purpose of correcting errors in the past allocation of such funding. In the case of one of our clients, the Metlakatla Indian Community, the Bureau of Indian Affairs made a significant correction in the allocation of contract support funds in FY 1985 at the time the grandfathering process commenced. However, through inadvertance the Financial Management Office at the BIA failed to adjust the recurring base for the program to correctly provide for the allocation of contract support in FY 1986 and FY 1987. In FY 1986 the matter was corrected on an ad hoc basis after being brought to the attention of the Area Office. Again, the tribe asked that the base be adjusted. Again, in FY 1987 the tribe discovered after the issuance of the contract, and well into the contract year, that the base had not been adjusted. Once again, the Metlakatla Indian Community had requested to take the action which all Bureau officials, both at the area level and at the central office level, agreed should have been done in FY 1985: to make a correction in the base which provides the correct grandfathered amount of contract support for Metlakatla's BIA contracts. We have been recently informed that the Bureau will provide the Community with only 80% of the amount to which the Community is clearly entitled. To get the balance, the Community will have to file a contract dispute.

In another similar case, we represented a tribal organization (Loneman School Corporation) in seeking its full entitlement under the grandfathering system. Once the contractor had gone to the trouble and expense of filing the dispute, the Bureau agreed to settle the claim for most of the amount in dispute. We are handling a number of similar disputes which are pending at various stages of resolution.

One of our clients has pointed out to IHS that tribes were not receiving certain types of funding which are available from IHS Headquarters to support personnel costs of IHS-operated service units. As a result IHS issued ISDM No. 85-4 which recognized that such costs of 638-operated programs should also be paid. These costs include Commissioned Corps retention special pay, continuation pay, moving costs for first post-of-duty, and continuing medical education. However, instead of permitting a reasonable allowance for such costs to be included in 638 contracts, ISDM 85-4 established an elaborate system under which contractors must apply for such costs after they are incurred and such costs may be paid to the extent that IHS evaluation, reveals that the contractor's "personnel system contains reasonably similar standards to those required of the Federal Government for the same purposes."

So far as we have been able to determine only one 638 contractor has ever received reimbursement under this September 1985 guideline. Our client, the Bristol Bay Area Health Corporation, has had a request pending since 1980. After many follow-up letters and meetings, it was finally asked recently for a copy of its employment agreement and was told on March 23, 1987 by IHS that it had begun a review "to determine what changes needed to be made in your personnel system and employment agreements to contain similar standards to those of the Federal Government for the same purposes."

We submit that IHS financial assistance for retention and continuation pay should not be conditioned on employee agreements in slavish conformity to standards contained in IHS Commissioned Corps Personnel Manuals (as suggsted by IHS).

While we consider that section 106(h) presently entitles BBAHC to funding of this character, Congress should amend the law to define more precisely the level of funding to which 638 contractors are entitled and. as well, to require a meaningful administrative hearing procedure on such issues. See recommendations below as to H.R. 1223, section 3, 5(b), 7, 8, 11 and 13.

These funding issues discourage tribes from utilizing P.L. 93-638. Failure of the BIA and IHS fully to reimburse tribal contractors for services performed (1) encourages the view that P.L. 93-638 is a device to shift the cost of federal services for Indians to the tribal treasury; (2) creates or augments severe financial problems for tribal governments; (3) denies to tribes and their members the benefit of funds Congress intended them to receive (Oglala Sioux Tribal Public Safety Commission and Miccosukee Tribe of Indians of Florida).

As a remedy for these problems, we propose:

(1) Congressional monitoring of the allocation of BIA and IHS funds to the local level to assure that funds are fairly and equitably distributed and that congressional directives are carried out. In particular, Congress should insist that IHS should apply RAM prospectively, i.e., announce in advance of contract negotiations the criteria and data on the basis of which contract amounts will be determined, instead of making such announcements in May (or later) for contractors who have been performing under approved budgets since the previous October;

(2) Enactment of sections 3 and 8 of H.R. 1223 to require adequate funding of indirect costs of contracts under P.L. 93-638.

Scope of Contracting

Both agencies have narrowed the scope of P.L. 93-638 contracting in defiance of the clear mandate of the statute. Clearly, Congress intended any service or program for the benefit of Indians carried on by the Secretaries to be contractible. Certain functions, of course, (lease approvals or contract monitoring) have to be performed by a federal official. But there is no reason why "construction" should be non-contractible (as provided by BIA regulations) or why information functions, program planning or technical assistance activities of an IHS Area Office should be non-contractible. IHS rulings on the latter point should be overturned by the Congress so that tribes will not need to engage in costly administrative appeals. See Indian Self-Determination Advisory No. 2, April 2, 1982; HHS Office of General Counsel Memorandum, dated December 21, 1981; ISDA No. 10, July 25, 1983, HHS Office of General Counsel Memorandum, dated September 16, 1982.

Congress should enact sections 3 and 4 of H.R. 1223 to deal with these problems.

Appeals

Both agencies have sought to narrow and circumvent the statutory and regulatory right of Indian tribes to appeal declination decisions under P.L. 93-638. We understand that BIA has never held a declination hearing under P.L. 93-638 (although we are aware of many disputes which should have entitled tribes to such a hearing) and that the Indian Health Service did not hold one until the Southeast Alaska Regional Health Corporation Appeal in 1985. Our experience suggests the following reasons for tribes' failure to take full advantage of the appeal procedure.

(1) Appeals are not meaningful because the BIA and IHS officials to whom appeals are taken may have already participated in the decisions appealed from. BIA has advised us that it will not provide for a recommended decision by the Departmental Office of Hearings and Appeals although that office conducts declination hearings under 25 CFR § 271.81. We question the reasons for taking the time of an Administrative Law Judge only to preside and assemble a record and not to provide any analysis of the issues for the benefit of the official who will make the final decision for the Government (especially when such official will not, himself, be hearing the evidence and arguments).

In the case of IHS, it is clear from the record in the SEARHC appeal that the proceedings from the initial decision through the Area Office decision of the IHS Director were dominated by the legal advice of the same government attorney. Furthermore, IHS persists in denying appellants the right to question IHS decisions as to the amount available under section 106(h) of P.L. 93-638, treating funding as a threshold issue. See ISDM 81-3; Letter, dated March 27, 1985 from IHS Director to Preston Thorgremson, Ellis and Holman.

Congress should strength tribal procedural rights by enacting sections 5(b), 7, 9, 11 and 13 of H.R. 1223 to assure more meaningful appeals for Indian tribes from agency officials who have demonstrated a persistent intent to narrow or discourage tribal self-determination. In addition, HR 1223 should be amended to ensure that a declination appeal will be heard and finally decided by an official outside the BIA and the IHS, respectively, as provided in H.R. 4174 which was passed by the House of Representatives last year.

We note that, as long as the agencies, themselves, unjustifiably resist tribal initiatives, the tribes will need legal advice in negotiations, appeals and (if necessary) litigating to achieve the degree of self-government intended by the Congress. Enactment of section 11 of H.R. 1223 will assure that Equal Access to Justice Act provisions for the award of legal expenses are applicable when tribes incur such costs in disputes under P.L. 93-638, an issue now in doubt. It will also for 638 contract disputes assure the expedited appeal procedure available under the Contract Disputes Act of 1978.

Other Provisions

Our clients support section 4 of HR 1223 which extends the protection of the Federal Tort Claims Act to contractors under P.L. 93-638. The maintenance of adequate liability coverage (especially for high-risk programs such as BIA law enforcement and health services) is a major cost of contracting which ultimately falls on the United States. Our client, the Bristol Bay Area Health Corporation, (which operates the federally-owned IHS hospital at Kanakanak) has been denied assistance by the United States in defending a medical malpractice suit in which the claim is substantially beyond its insurance coverage. We understand that recently the United States settled for a minor sum a suit against a federal employee detailed to the 638 contract hospital on the Mississippi Choctaw reservation without any consultation with the tribal contractor, which was sued by the plaintiff the following week. Correspondence on these matters is enclosed. We urge that section 4 be extended to BIA contracts, as well (at least to those contracts such as law enforcement, fire prevention, and schools) where significant liability insurance would otherwise be necessary.

Other provisions of HR 1223 supported by our clients include a guarantee that the availability of carryover funds will not reduce additional federal funding, extension of the right to expend carryover funds to a third year, section 10 relating to audit appeals, and section 7 allowing the transfer of title to tribes of surplus federal personal property.

With respect to section 11 relating to the enforcement of indirect cost rates we recommend consideration of the amended language proposed by Bryant Rogers, Esquire, attorney for the Alamo Navajo School Board (see enclosure).

We propose the consideration of the following additional amendments:

1. Enforcement of deadlines. The agencies have failed to act on applications or to hold declination hearings within the deadlines specified by regulations. We urge that the Congress monitor the agencies' performance in this regard, require regular reports on the status of applications and appeals and insist that the agencies proceed with such organizational restructuring as may be necessary to assure compliance with such deadlines.

We recommend that -- whatever method is used to provide contract funding (letter of credit, tele-communication transfer, etc.) -- BIA and IHS be required not to terminate funding without compliance with the procedural requirements provided for by statute and regulations for contract cancellation or reassumption of programs. Some of our clients have faced coercive action by the agencies to withhold funds without giving the contractor the time for corrective action and the appeal rights required if the contract is to be cancelled.

Both agencies have published regulations specifically designed for 638 contracting and indicate in their regulations that these regulations are exclusive, that other federal procurement requirements do not apply. However, contracting officers and other agency staff sometimes get away with the inclusion of contract requirements which are legally non-mandatory. We recommend that HR 1223 be amended to include a requirement that all 638 requirements be specified in 638 regulations. In particular, reporting requirements should be streamlined, mandated by regulation, and no additional reporting requirements permitted.

One of the funding level issues presented under section 106(h) (as noted above) is the diversion of the funding level required by section 106(h) to pay for in-house BIA or IHS expenses (such as contract monitoring, ADP purchases, etc.). The present language of section 106(h) is clearly sufficient to make Congress' intention clear on this point but (as at present in the Miccosukee and Oglala Sioux Public Safety Commission appeals) enforcement of such rights can be costly and time-consuming, denying a tribal contractor the benefit of an annual funding level to which it is entitled even if it wins in the end. Some have suggested criminal penalties for such diversions. A problem with this is that criminal penalties may not fall on the agency personnel really responsible for the diversion but on a lower level official (i.e., contracting officer) who is merely carrying out orders. It also may be that an Area Director or a higher official may act on erroneous information from finance staff. We recommend that the Congress direct the General Accounting Office to monitor BIA and IHS performance as to this matter.

BIA and IHS regulations prohibit unilateral contract modifications by the government except in specific cases (such as congressional funding reductions). We recommend that this prohibition be placed in the statute since BIA and IHS sometimes violate the regulation.

For tribal contractors who have had contracts in place for years, contract renewals should be automatic subject to budget negotiations based on funding availability. The BIA Procedural Guidelines under 25 CFR Part 271 (April 1977) provide for such a procedure in its chapter on "Recontracting." However, these guidelines are often ignored in the BIA, probably because they reinforce tribal rights. We recommend that the Committee consider enacting the principles on "recontracting" contained in the Procedural Guidelines. Tribes should not be required to resubmit detailed contract proposals for renewal when they have satisfactorily performed 638 contracts for years. We also suggest that the Committee review with the BIA the status of these Guidelines and why it is that (although still in effect as instructions to BIA staff) they are not generally available in the field. We have even found it necessary to call their existence to the attention of attorneys in the Office of the Associate Solicitor for Indian Affairs.

Further reforms in self-determination contracting could certainly be made, but in our opinion, enactment of the specific amendments proposed above would have a dramatic effect in restoring the confidence of tribes in the intentions of the United States with respect to the self-determination program and in sending a message to BIA and IHS that the Congress is serious about ending the federal domination of Indian service programs without reducing the level of federal financial support.

Thank you for the opportunity of presenting these views.

Sincerely yours,

HOBBS, STRAUS, DEAN & WILDER

By: S. Bobo Dean

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service
Indian Health Service
Health Resources and
Services Administration
Rockville MD 20857

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ISDA 10

INDIAN SELF-DETERMINATION ADVISORY NO. 10

Subject: INDIAN SELF-DETERMINATION ACT - CONTRACTING FOR OPERATION OF A TRIBAL HEALTH BOARD AND TRIBAL COMMUNICATIONS NETWORK

As noted in Indian Self-Determination Advisory No. 2, dated April 2, 1982, the Office of the General Counsel, Department of Health and Human Services (HHS), has advised that under section 103(a) of the Indian Self-Determination Act (P.L. 93-638) the Secretary is required to contract with tribal organizations to carry out specific programs or services which the Secretary is authorized to administer for the benefit of Indians. The opinion stated that Federal management activities at the Indian Health Service (IHS) Area/Program Office and headquarters level were not in themselves "programs or portions of programs but rather activities necessary for the overall management of IHS as a Federal agency." The opinion concluded, therefore, that such management activities were not contractible under section 103(a) of the Act.

The same approach was used in a later opinion from the Public Health Division, Office of the General Counsel, HHS, involving proposals for contracts to support the operation of a tribal health advisory board and a tribal communications network.1/ The tribal health advisory board served as the mechanism for member tribes to formulate tribal policies on matters related to IHS health programs and as a liaison between its member tribes and IHS. The tribal communications network functioned as an information clearing house for member tribes on program and legislative matters relating to Indian health. The General Counsel opinion held that such activities, standing alone, were merely ancillary to IHS program management and did not constitute a specific IHS program or service. The opinion concluded that the tribal health advisory board functions and the communications network were not contractible under section 103(a) of the Act. However, as noted in the opinion, IHS can, where appropriate, support Indian health boards by contracts entered into under the Buy Indian Act, 25 U.S.C. 47.

Robert C. Birch
Robert C. Birch
Acting Chief, Indian Resource Liaison Staff

1/ Memorandum dated September 16, 1982 subject Contracting for Operation of a Tribal Health Advisory Board and Tribal Communications Network under the Indian Self-Determination Act to the Director, Indian Health Service. A copy of the opinion will be furnished by the Indian Resource Liaison Staff on request.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
PUBLIC HEALTH SERVICE
HEALTH RESOURCES AND SERVICES ADMINISTRATION
INDIAN HEALTH SERVICE
ROCKVILLE, MARYLAND

INDIAN SELF-DETERMINATION MEMORANDUM NO. 85-4

FUNDING OF NON-RECURRING PERSONNEL COSTS UNDER P.L. 93-638 CONTRACTS

Sec. 1. - Purpose
2. - Background
3. - Policy
4. - Effective Date

1. PURPOSE: To clarify the availability of funds to meet certain non-recurring personnel costs under P.L. 93-638 contracts and the requirements for obtaining such funding.

2. BACKGROUND: In addition to the amount budgeted for Indian Health Service (IHS) direct operations, funds are made available to meet certain non-recurring costs associated with personnel actions. Since the costs in this category cannot be predicted with any reasonable degree of accuracy, funds to meet these costs are currently made available on an as-indicated basis. Such costs are: (A) Commissioned Corps Retention Special Pay (Physicians); (B) Commissioned Corps Continuation Pay (Dentists); (C) Moving Cost for First Post of Duty; and (D) Continuing Medical Education (CME).

Funding for these non-recurring costs has not been made available to P.L. 93-638 contractors since the costs could not appropriately be included in the recurring base of the contract. It appears, however, that such similar costs could be reasonable and allowable costs incurred by the contractor.

Further study of this issue suggests that parity of treatment for P.L. 93-638 contractors and IHS direct operations requires that these non-recurring costs should be made available to P.L. 93-638 contractors on a basis comparable to IHS direct operations. Such fund availability should be subject to the same conditions as prescribed for the IHS, to insure that comparable obligations are assumed by the tribal employees who are receiving comparable benefits.

Distribution: PHS 110-129 Tab D, Tribes, Tribal Organizations
Date: September 20, 1985

3. POLICY: Consistent with the IHS policy of sharing proportionately appropriate resources between IHS direct and P.L. 93-638 contract programs, and to the extent that the P.L. 93-638 contractor's personnel system contains reasonably similar standards to those required of the Federal Government for the same purposes, funds may be made available on an as-indicated basis for reimbursement of the non-recurring personnel costs as defined below.

   A. Commissioned Corps Retention Special Pay Equivalent (RSPE). The purpose of RSPE is to aid the P.L. 93-638 contractor to recruit and retain competent physicians for employment by the contractor to carry out a P.L. 93-638 contract.

   B. Commissioned Corps Continuation Pay Equivalent (CPE). The purpose of CPE is to assist the P.L. 93-638 contractor to recruit and retain competent dentists for employment by the contractor to carry out a P.L. 93-638 contract. The CPE will be available only for dentists who come within a "specialty category" which has been determined and designated by the Assistant Secretary for Health of the Department of Health and Human Services to be critical in carrying out the mission of the IHS.

The standard by which IHS will evaluate the P.L. 93-638 contractor's personnel system regarding RSPE and CPE is the Commissioned Corps Personnel Manual, Subchapter CC22.2. In both cases (A and B), the term "equivalent" is used to describe physician and dentist costs to the P.L. 93-638 contractor which are equal to Commissioned Corps Medical and Dental Officer costs to the IHS.

NOTE: The current Continuation Pay authority is scheduled to expire at the end of Fiscal Year 1985. Upon the implementation of new Continuation Pay authority, this policy will be revised/amended if necessary.

   C. Moving Costs for First Post of Duty. The IHS is authorized to pay travel and transportation expenses to the first post of duty for persons appointed to positions in the United States for which there is a manpower shortage.

The standards by which IHS will evaluate the P.L. 93-638 contractor's personnel system regarding moving costs for the first post of duty are Federal Personnel Manual, Chapter 571 and Department of Health and Human Services Personnel Manual, Chapter 571.

   D. Continuing Medical Education (CME). The purpose of CME for tribally employed physicians is to keep them informed of pertinent new developments in the diagnostic and therapeutic aspects of patient care and to refresh various aspects of their basic medical education.

The standards by which IHS will evaluate the P.L. 93-638 contractor's personnel system regarding CME are the standards used for IHS direct operations.

To the extent available, non-recurring funds to support these costs (RSPE, CPE, Moving Costs for First Post of Duty, CME) will be considered when documented and requested by the contractor.

4. EFFECTIVE DATE: This policy will apply to P.L. 93-638 contracts with a period of performance beginning on or after the effective date of this policy (September 20, 1985).

Robert C. Kreuzburg M.D.
for G. H. Ivey
Acting Director
Indian Health Service